16-360

OFFICE SUPREME COURT U.S.
FILED
NOV 4 1882
JAMES H. MCKENNEY, CLERK

In the Supreme Court of the United States,

October Term, 1882, No. 1033

CHARLES H. VAN WYCK, APPELLANT.

vs.

SHERMAN W. KNEVALS.

BRIEF AND POINTS FOR APPELLEE.

F. C. Festner Steam Printers, Omaha, Neb.

In the Supreme Court of the United States,

October Term, 1882, No.....

CHARLES H. VAN WYCK, APPELLANT.

vs.

SHERMAN W. KNEVALS.

BRIEF AND POINTS FOR APPELLEE.

This is an appeal against a decree of the Circuit Court of the United States for the District of Nebraska.

The facts so far as it is necessary to state them for the purpose of this appeal are as follows: On the 23d of July, 1866, Congress passed an act, a copy of which is annexed to the bill, the first section of which is as follows:

"That there is hereby granted to the State of Kansas, for the use and benefit of the St. Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Elwood, in Kansas, westwardly, via Maryville, in the same State, so as to effect a junction with the Union Pacific Railroad, or any branch thereof not further west than the one-hundredth meredian of west

longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid: which lands, thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid."

Then follow several provisos not material here to notice.

The 4th section provides:

"That as soon as the said Company shall file with the Secretary of the Interior maps of its lines, designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the puposes of this act and subserve the public interest."

The Company duly accepted the act; and its engineers having made, and its directors having approved, a topographical map of the country through which it proposed to build its road, on the 25th of March, 1870, the said map, endorsed with certificates showing the action of the direc-

tors in that behalf, was filed with the Secretary of the Interior, who accepted it. On the 28th of the same month he transmitted it to the Commissioner of the General Land Office in a letter, in which, among other things, he directed that officer to "instruct the proper local officers to withhold from sale, or other disposal, the odd numbered sections within the limits of twenty miles on each side of the road."

On the 8th of April, 1870, the Commissioner forwarded a copy of the map to the Register and Receiver of the Land Office, at Beatrice. It was not received by those officers until April 15th. The company built and completed sections of the road from time to time, until July 15th, 1872, when it was completed to Hastings, where it made a junction with the Burlington & Missouri River Railroad in Nebraska; but the road has never been completed to any point on the Union Pacific, unless the said Burlington road is a branch thereof. The road so built was substantially on the line delineated on the map, and ran through Thayer and Nuckolls counties, which are within the district of lands subject to sale at Beatrice. But, at a point about one mile east of the lands in question in this suit and about seventy five miles east of Hastings, the road as constructed departed from the proposed line as shown on the map; at a point opposite the lands here in controversy the road as built was from forty to sixty rods from the line marked on the map; and from that point to Hastings it deflected from the line marked on the map from one to three miles. The lands in dispute are within ten miles of the road as built and of the line delineated on the map. Section 3 of the act making the grant, among other things, provides that,

"The lands hereby granted, held, and reserved as aforesaid, shall inure to the benefit of said Company as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land hereinbefore granted as lie opposite to and coterminus with the said completed sections. And when certificates of the Governor, aforesaid, shall be presented to said Secretary, of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the said sections of said land as aforesaid for each of said sections of road until said road shall be completed."

As each section of the road was built, the Governor of Kansas made the required certificates and filed them with the Secretary of the Interior. Patents for most of the lands claimed to have been granted by the act have been issued to the Railroad Company.

On the 13th of April, 1870, that is to say eighteen days after the map was filed with the Secretary, and two days before it reached the local office, the appellant entered the lands here in question at private entry at the office at Beatrice, and paid therefor one dollar and twenty-five cents per acre; and on the 15th of November, 1871, a patent was issued to him therefor. On the 15th of April, 1873, and not before, the Railroad Company filed its articles and other evidences of incorporation with the Secretary of State of Nebraska, but did not otherwise attempt to comply with the laws of that State in respect of foreign corporations extending their road into that state.

The original plaintiff and appellee here claims under the Railroad Company.

The cause was heard in the Circuit Court upon the pleadings and an agreed statement of facts and a decree was rendered in favor of the plaintiff according to the prayer of the bill, and the defendant appeals to this Court.

FIRST POINT.

The first objection urged by the appellant against this decree, is that it declares that the line of the road became definitely fixed by the filing of the map with the Secretary and his order to withdraw the land from market, which was on the 25th of March 1870: whereas it should have declared that the line was not definitely fixed until the officers at Beatrice received the order, which was on the 15th of April.

That the case turns on the question, when the line of the railroad was definitely fixed, is apparent from the slightest examination of the act making the grant. Section one provides that "there is hereby granted to the State of Kansas, for the use and benefit of the * * * Company * * * every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, *when the line or route of said road is definitely fixed*, sold any section or any part threof granted as aforesaid," or otherwise appropriated the same "then it shall be the duty

of the Secretary of the Interior to cause to be selected," an equal amount of lands in lieu thereof.

This Court has said a great many times that acts like this are present grants: that because the route of the road is not fixed by the terms of the act, the grant is a float: that when by appropriate action the line becomes fixed, the grant is by that fact located and attaches to the particular tracts of land: and that the title then vests in the grantee by relation from the date of the act.

In Railroad Co., *vs.* Baldwin, 103 U. S., 426, 429, where this very act was under consideration, Mr. Justice Field, speaking for this Court, said:

"The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. 'There is hereby granted,' are the words used, and they import an immediate transfer of interest, so that, when the route is definitely fixed, the title attaches from the date of the act to the sections, except such as are taken from its operation by the clauses mentioned."

These clauses, by which exceptions from the grant are made, are in this and all similar acts,

1. lands which have been sold, at the time the route is definitely fixed,

2. lands to which a homestead or pre-emption right has at the same specified time attached,

3. lands also at the same time reserved by the United States for any purpose.

So that in any case, the question is, when is the route definitely fixed? For, whatever lands were at that time within either of the three classes of exceptions above mentioned are not granted, and all others are. In this particular

case, the question is, is the route definitely fixed by the act of the Company filing the map with the Secretary and his order to withdraw the lands from sale, or by the act of the local officers withdrawing the lands from market? Because, here, as has been stated, the map was filed and the Secretary's order was made on the 25th of March, the appellant entered the land on the 13th of April, and the local officers withdrew the land from market on the 15th of the same month. If the route was definitely fixed on the 25th of March, the decree was right: if it was not definitely fixed until April 13th, the decree was wrong.

This precise question was decided by Mr. Justice Miller, upon this very act, in Knevals *vs.* Hyde, 5 Dillon, 469 S. C., 1 M. Crary, 402, and by Circuit Judge Sawyer, upon a similar act, in Railroad Company *vs.* Orton, 6 Sawyer, 179. The reasons for this view are obvious:

1. In the first place, consider the act of the company in filing the map. This document shows the route which the engineers of the railroad company have, after examination, adopted. But those officers, with all their skill and experience and examination, could not definitely locate the line. It was their duty to advise the governing body what ought to be done in this behalf: but that was the extent of their power. It was for the Board of Directors to determine what was the proper line for the route. But its action remained under its control, subject to any change which, upon further information or consideration, it should see fit to make; its action was not final until its power to change the line was exhausted. But when the Board, which was the only body which could fix the route acted, and then put it out of its power to change its

action, the route was definitely fixed. And that action was the filing of the map with the Secretary.

This appears from a consideration of the consequences which immediately flow from that act. Neither the Secretary nor any other officer of the government has any authority to inquire whether the line is a proper one, or to refuse to accept the map, or to exercise any discretion or judgment or power in the premises. As soon as the Company files its map with him, it becomes his duty to withdraw from market the lands granted; that is to say, "every alternate section of land designated by odd numbers for ten sections in width on each side of said road." What lands are granted is not for him to determine; that is done by the very terms of the act.

So that it clearly appears that the act of the Company in filing the map on which the route is delineated, definitely fixes the route and determines what lands are granted.

And this is the view which this Court has taken of the matter. In Grinnell *vs.* Railroad Co., 103 U. S. 742, Mr. Justice Miller says:

"The grant under the act of 1856 was, as has been often said, a grant *in praesenti;* and though exactly what this means has been the subject of much controversy, we think its ascertainment is not difficult. The only doubtful element of the problem is the location of the road, which by the terms of these grants, is necessary to identify the sections granted on each side of it. Whenever that is done, so that a surveyor or the officers of the Land Department can protract the line of the route on the maps of the public lands, within the limits of the grants, the identity of the lands granted is mathematically ascertained, and the title relates back to the date of the grant."

"So far as lands are found in place, when this done, not coming within the exception as sold or held under pre-emption, the title, or at least the right to this land in place, is at once vested in the State or in the Company to which the State has granted it; and the means of ascertaining precisely what lands have passed by the grant is to be found in the map of the line of the road, which is filed in the General Land Office under provisions of the Statute."

2. But this case does not rest only upon the effect of filing the map. The Secretary did what the law does not require him to do; he accepted the map; and then, three days afterwards, namely, on the 28th of March, fifteen days before the appellant's entry, he did what the statute required him to do: he orderd the land granted withdrawn from market. This certainly operated a definite location of the route. Nothing more was required by the act making the grant, nothing more could be done from the very nature of the case, to fix the route definitely.

It is said that the action of the Secretary ought not to be effective, until notified to the local officers. The short answer to that is, that the statute does not so provide. Had Congress thought that necessary, proper or right, it would have so expressed the exception to the grant: instead of saying, "in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold any section," &c., Congress would have said, "in case it shall appear that the United States have, when notice is received at the Local Land Office that the line or route of said road is definitely fixed, sold any section," etc.

3. The consequences of the appellant's view are fatal to it. If exceptions from the grant to the Company ex-

tend to lands sold at any time before the local Land Officers receive notice from the General Land Office to withdraw the land from market, it is within the power of the Land Department to annul the act of Congress. The Company may do everything required of it: it may accept the provisions of the grant: it may survey and mark the line in the field, and make a map thereof: it may file the map with the Secretary and obtain his approval of it and his order that the lands be withdrawn from market: and yet, if a clerk in the General Land Office is dilatory in transmitting the order to the local Office, others may step in and enter all the lands granted: The wakefulness of the Company avails nothing, if while the clerk is asleep, others were vigilant. This Case is an illustration. It was on the 28th of March that the Secretary ordered the Commissioner to withdraw the lands from market. Not until the 8th of April, ten days afterwards, did the Commissioner do as he was bid. And it took seven days more for his letter to reach the local Office. Just two days before its arrival there, this entry was made, together with a great number of others, as the Counsel for the appellant is at pains to inform the Court. How these entries came to be made by the appellant and others on that day is matter of conjecture.

It is no answer to say, that if the grant is to have effect from the filing of the map, or the order of the Secretary, parties may enter the lands with no knowledge that they are not subject to sale. In the first place an entry at a local Office is no more than a proposition by the party to make a purchase of the land from the United States. It is subject to approval by the superior officers of the

Land Department; and especially is it subject to any right which has attached to the tract before the entry: and this, too, without regard to whether the party making it knew of the prior right or not. It has often happened, and from the nature of the case must often happen, that parties make entries of public lands in ignorance of prior rights which defeat their purchases. Indeed, in very many, perhaps most of the contests in the Land Department and in the Courts, such has been the case. And yet it was never heard that a right second in time was preferred to a prior right, for such reason.

4. It can hardly be necessary to present to this Court cases analagous to this. But it may not be altogether uninteresting to mention some where rights to build or to take lands for building roads have been granted to companies, and they have been required to file maps of lines of their routes in a public office, and where that act has been held to be decisive of their rights.

In the case of the Morris and Essex R. R. Co. *vs.* Blair, 9 N. J. Ch. 635, the question was presented as to the priority of right through certain mountain passes in New Jersey, claimed on the one side by the Morris Company, and on the other by the Warren Company. The former was, by a supplement to its charter, authorized to extend its road from Dover to any point on the Delaware River, between Belvidere and the Water Gap, a distance of fifteen miles; the other was authorized to extend its road from New Hampton on the Central line, to any point on the river, within five miles above the Water Gap. No particular route was granted or prescribed to either, other than their commencements and indefinite termini, above

described. The language of the charter of each provided that "when the route of such road shall have been determined upon, and a survey of such route deposited in the office of the Secretary of State, then it shall be lawful for said Company to enter upon" and construct their road.

The Court in its judgment says:

"It may be true that the complainants first actually "surveyed in the passes where the conflicts occurred, "although there seems to be some doubt upon this subject. "But, assuming it to be true, the mere experimental sur- "veying of a route will not confer any vested or legal "right, until it shall have been adopted; until then, the "Company is in no wise committed to it. If done by their "direction, they may change their mind and go elsewhere. "It may be the mere act of their engineer, and he may "recommend it or not. If he should, the Company may "reject it and select another route. Although the com- "plainants therefore may have first surveyed the conflicting "passes in the mountains, yet the Warren Company after- "wards surveyed the same passes, and first adopted the "route, and first filed their survey in the office of the Sec- "retary of State. This gave them a legal right to the route "surveyed, and in my view, excluded the complainants from "occupying the same lands."

The Charlestown Branch R. R. Co. *vs.* The County Commissioners of Middlesex, 7 Metc. 78, was a petition for a *certiorari* to bring up the record of the County Commissioners, concerning the allowance of damages to the owners of Harris' Wharf. The statute provided that the Company should "file the location of their road within one year, with the Commissioners of each county through which the same passes, defining the courses, distances, and boundaries of such portion thereof, as lies within each

county, respectively." It also provides that after the Company had taken any lands, the owner thereof, within three years therefrom, might demand a plan or description in writing, of the land taken, which, within thirty days, the Company should deliver to him. Construing these provisions, the Court held that the filing of the location of the road operated a taking of the land.

In Davidson *vs.* The Boston & Maine R. R., 3 Cush. 91, Shaw, C. J., speaking of the same statutory provision, says that "the act of filing a location is a formal act of the assertion of a right, and it is notice to the public and to all parties interested. It is a mere act of location—and the land may be considered *prima facie* as taken—and the party then owner may claim accordingly and may recover" his damages for the taking of the lands.

The Boston and Providence R. R. Corporation *vs.* The Midland R. R. Co., 1 Gray, 340, was a petition for a *quo warranto*, to inquire by what right the defendant Company was building a certain reach of road. The statute was the provision first referred to above, and then provided, that after the Company had taken land for any portion of their road, they might vary the direction of it. And it was held, in an elaborate opinion by Chief Justice Shaw, that land was taken within the meaning of the act by the filing of the location with the Commissioners so as to authorize the Company thereafter to vary the direction of the road.

The Hudson & Delaware Canal Co. *vs.* The New York and Erie Railroad Co., 9 Paige, 323, was a bill for an injunction to restrain the defendant Company from building a section of its road through a difficult pass

previously occupied by the plaintiffs' canal, on the ground that it had previously located its line elsewhere. The defendant Company was authorized "to select, and by certificates under their hands and seals, to designate the line, course, or way which they should deem most advantageous for their railroad; and to file one of such certificates in the office of the Register of the City of New York, and one in the Clerk's office of each of the counties through which the railroad should pass."

The Chancellor, in the course of his judgment, says that he "should not hesitate to grant an injunction, if the complainants had succeeded in showing that the Railroad Company had already located its road upon the more northerly route, so as to preclude them from changing such location without the consent of the legislature." And again he says: "When the line of the road had been thus designated by the directors, (that is, by the filing of the certificates, as required by the act), they would not have been authorized to change the route of the same, without the authority of a subsequent act of the legislature, if such change interfered with the rights of any individual or corporation, or the interests of the public."

In the Little Miami Co. *vs.* Naylor, 2 Ohio St. 235, which was an action for damages to Naylor's house, on account of the Company having changed the location of its road, the Court, discussing the right of the Company to make such change, says that the strip of country within which the Company may make its location, is frequently several miles in width, and that "this extent of country is not all appropriated to the use of the road, but only so much as may be necessary for a track. Its (the Company's)

right to it is simply one of selection, and when it has made its selection, its rights over all the other territory ceases."

In these, and many other cases to the like effect, the statute did not in terms provide that by the act of filing its map, the Company definitely fixed the rights of itself, and all other parties as well. But the Courts held that such was the decisive result; and the reason is obvious: at some time, by some act, the rights of all parties must be concluded,—that of the Company to define its line, to take lands for its road, and to change its route; and the converse liability of other parties in the same respects. And these rights on the one hand, and liabilities on the other, come into operation when the last act of the parties is performed.

The statute here under consideration, requires the Company to file a map of its lines, with the Secretary of the Interior, for a purpose much the same as those in view in the cases cited. The act making a grant, not of land in place, but of lands on each side of a line thereafter to be established, it is necessary that the Land Department should, as soon as practicable, be informed of it, that it may know what lands are to be taken, and that it may do what the statute requires and what the case requires: namely, withdraw the lands from market.

That being the object of the provision requiring the filing of a map of the route, here, as in other cases, the effect of the act of filing will be to fix definitely, the rights of the parties.

SECOND POINT.

The second objection to the decree appealed from, is

that the Company did not build the road on the line delineated on the map. Opposite the lands here in question the road as built was from forty to sixty rods from the line delineated on the map; but these lands were within ten miles both of the road as built and the line shown on the map. From this point west to the terminus of the road at Hastings, the deflection was from one to three miles. To this contention there are several obvious answers.

1. The deviation is too trivial to be worthy of consideration—certainly such is the case at the point opposite these lands, and what the Company did or failed to do elsewhere, does not concern this appellant. He claims land within the limit, whether it be measured from one line or the other.

2. The Statute provides that the Governor of Kansas shall certify to the Secretary of the Interior, the completion of the road in sections of ten miles each, in a good substantial and workmanlike manner; and upon such certificates the Secretary shall cause patents for lands lying opposite to and coterminous with the sections so completed, to be issued to the Company. The Governor made the required certificates; and it is reasonable to suppose that he stated in them the difference between the line shown on the map and that of the road as built: notwithing which, the Secretary ordered the issue of patents for most of the lands covered by the grant. Thus we see that the officer who was charged with the duty of seeing to it that the conditions of the grant were complied with, did not deem the departure from the line of the route of the road material.

3. But there is another decisive answer to the objec-

tion; and that is, that this matter does not concern this appellant. As we have seen from the judgments of this Court, only one of the large number of which have we thought it necessary to cite, this grant was a present grant which obtained location by the filing of the map of the line of the route of the road, upon which it related to the date of the act. At the same time it was subject to forfeiture from failure to build the road as and within the time limited in that behalf in the act. Now who can take advantage of that failure and declare the forfeiture? Certainly not this appellant.

Upon this point Grinnell *vs.* Baldwin Co., already cited is decisive. In that case the words of the grant were the same as we have here; and Mr. Justice Miller says at page 744:

"Another point equally fatal to the plaintiffs in error is that the assertion of a right by the United States to the lands in controversy, was wholly a matter between the Government and the Railroad Company or its grantors. The legal title remains where it was placed before the act of 1864. If the Government desires to be reinvested with it, it must be done by some judicial proceeding or by some act of the Government, asserting its right. It does not lie in the mouth of every one who chooses to settle on these lands to set up a title which the Government itself can only assert, by some direct proceeding. These plaintiffs had no right to stir up a litigation, which the parties intrusted did not desire to be started. It might be otherwise if the legal title were in the Government, then the land would be subject to pre-emption or homestead rights. But the legal title is not in the Government; and as we have already shown, the equity is more than doubtful." Schulenberg *vs.* Harriman, 21 Wall, 44: Tucker *vs.* Furguson, 22. *Ib.* 527."

This language is in every word of it applicable to this case. In the case cited of Schulenberg *vs.* Harriman the nature of the grant, and the effect of the condition subsequent is elaborately examined; from which Judge Miller's deduction that the United States alone can enforce the forfeiture is obvious.

Here, however, we have the affirmative action of the proper Officer of the Government accepting the road as built, and notwithstanding the deviation. How then can it be permitted, this appellant to allege this matter against a title otherwise unquestionable?

THIRD POINT.

It is thirdly and lastly insisted that this Railroad Company was a Kansas corporation, and did not comply with the laws of the State of Nebraska in respect of Foreign Railroad Corporations extending their roads into that State.

The same objection was made in the Railroad Co. *vs.* Baldwin, 103 U. S., 426. Speaking on this subject Mr. Justice Field says:

"The fact that the right of way over land in Nebraska was granted to a corporation in Kansas does not alter the case. Nebraska was at the time a territory of the United States, and it was entirely competent for Congress to confer upon any corporation of a state a right of way for a Railroad to be constructed by it through the lands of the United States situated in that Territory: and in February, 1869, after the Territory had become a State, its legislature, by an express enactment, authorized Railroad Companies organized under the laws of Kansas, Missouri, or

Iowa, to extend and build their roads into the State, and declared that upon complying with certain conditions they could possess all the powers, franchises, and privileges of Railroad Companies incorporated under its laws. It is not shown that the Company here has not complied with the prescribed conditions, even if such an objection could be raised by any other party than the State itself. But, independently of this consideration, where Congress has conferred upon a Railroad Corporation of a State a right of way over the public lands of the United States in any one of their Territories, it may be doubted whether the State subsequently created out of the Territory could prevent the enjoyment of such corporation of the right conferred. It could do so only on the same terms that it could refuse a recognition of its own previously granted right, for in such matters the State would succeed only to the authority of Congress over the Territory."

This is decisive of the matter.

J. M. WOOLWORTH,

OF COUNSEL FOR APPELLEE.

16-371

TRANSCRIPT OF RECORD.

Supreme Court of the United States.

OCTOBER TERM, 1882.

EX PARTE: IN THE MATTER OF NEWTON MARTIN CURTIS, PETITIONER. } No. 6 ORIGINAL.

PETITION FOR WRIT OF HABEAS CORPUS.

Filed 9th Oct. 1882.

Supreme Court of the United States.

No. Original.

Ex Parte: In the Matter of Newton Martin Curtis, Petitioner.

PETITION FOR WRIT OF HABEAS CORPUS.

INDEX.

	Page.
Petition	1
Order Allowing Writ	2
Return of Marshal	3
Order of Chief Justice	4
Bond	5
Indictment (see Exhibit A, pp. 2–4)	2–4

UNITED STATES OF AMERICA.

TO THE HONORABLE MORRISON R. WAITE, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

I. The petition of Newton Martin Curtis respectfully shows that he is now a prisoner confined in the custody of Henry E. Knox, United States Marshal of the Southern District of New York, upon process issued upon conviction upon two counts of an indictment for an alleged criminal offence, as set forth in the exhibit hereto annexed, and marked "Exhibit A." 2

II. That the cause of his confinement is by virtue of process issued for his detention by and in the custody of said Knox, as such Marshal, until said Curtis perform sentence for the alleged offence specified in said Exhibit A. 3

III. That he is informed by his counsel, and verily believes, that his confinement is illegal, and that such illegality consists in this: that the Act of Congress of August 15, A. D. 1876, Chapter 287, Section 6, under and by virtue of which the indictment set forth in the exhibit annexed was found, and upon which said process issued, is not authorized by the Constitution of the United States, and is unconstitutional and void. 4

Wherefore, your petitioner prays for a Writ of Habeas Corpus to the end that he may be discharged from custody; and, also, for a Writ of Certiorari (if necessary), that the cause of his commitment and detention may be made to appear.

Dated New York, July 20, 1882.

NEWTON MARTIN CURTIS.

5 SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

NEWTON MARTIN CURTIS, the above-named petitioner, being duly sworn, says that the foregoing petition is true to his own knowledge except as to those matters that are therein stated on information and belief; and as to those matters, he believes it to be true.

NEWTON MARTIN CURTIS.

Sworn to before me, }
this 20th day of July, }
6 1882. }

JOHN A. SHIELDS,
U. S. Commissioner,
Southern District of N. Y.

UNITED STATES OF AMERICA.

TO HENRY E. KNOX, UNITED STATES MARSHAL FOR
7 THE SOUTHERN DISTRICT OF NEW YORK.

You are hereby commanded to have the body of Newton Martin Curtis, by you imprisoned and detained (as it is said), together with the time and cause of such imprisonment and detention, by whatsoever name said Newton Martin Curtis shall be called or charged, before the Chief Justice of the Supreme Court of the United States, at 173 Fifth Avenue, in the City of New York, in said District, within three days of the receipt of this writ, to do
8 and receive what shall then and there be considered concerning the said Newton Martin Curtis.

And have you then and there this writ.

July 24th, 1882.

M. R. WAITE,
Chief Justice of the United States.

UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF NEW YORK,
NEW YORK, July 24th, 1882.

In obedience to the within writ, I do herewith produce the within named Newton Martin Curtis, and a certified copy of the sentence of the Circuit Court of the United States, for this District, which said sentence and the commitment thereon is the cause of the imprisonment and detention of the said Curtis.

HENRY E. KNOX,
U. S. Marshal.

At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the City of New York, on Thursday, the twentieth day of July, in the year of our Lord one thousand eight hundred and eighty-two.

Present—The Hon. CHARLES L. BENEDICT, Circuit Judge.

THE UNITED STATES

vs.

NEWTON M. CURTIS.

On motion of the United States District Attorney. Ordered sentence :

The Court thereupon proceed to pass judgment, and the prisoner, Newton M. Curtis, is sentenced to pay a fine of five hundred dollars on the first count of the indictment, and the sum of five hundred dollars on the eighth count of the indictment,

making in all the sum of one thousand dollars, and that he stand committed until said fine be paid.

A copy from the minutes,

[SEAL] JOSEPH M. DEUEL,
Clerk.

NEW YORK, July 24th, 1882.—Upon consideration of the matters presented in the application of Newton Martin Curtis for the within writ, and upon the foregoing return thereto, it is hereby

ORDERED, that the further consideration thereof be postponed and adjourned into the Supreme Court of the United States, at its session next to be holden at Washington, D. C., upon the second Monday of October next, and said Curtis is hereby admitted to recognize in the sum of two thousand dollars, with sufficient surety, for his appearance at the time and place aforesaid, and to abide the action of said Court in the premises, upon the giving of which recognizance, he is to be discharged from his imprisonment.

M. R. WAITE,
Chief Justice of the United States.

KNOW ALL MEN BY THESE PRESENTS, That we, Newton Martin Curtis, of Ogdensburg, St. Lawrence County, in the State of New York, as principal, and William A. Jones, of Richmond Hill, L. I., and Sidney DeKay, of New Brighton, Richmond County, in said State, as sureties, are jointly and severally bound and obliged and acknowledge ourselves indebted to Henry E. Knox, Esquire, Marshal of the United States for the Southern District of New York, in the sum of two thousand dollars, lawful money of the United States of America, to be paid to the said Marshal, or his certain attorney, executors, administrators or assigns, or his succes-

sors in office, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the twenty-fourth day of July, Anno Domini one thousand eight hundred and eighty-two.

Whereas, Newton Martin Curtis has obtained from the Chief Justice of the United States a certain Writ of *Habeas Corpus* returnable this day before the said Chief Justice at No. 173 Fifth Avenue, in the City of New York, to which writ due return has been made by the Marshal of the United States for the Southern District of New York, who brings and now has the said Curtis before said Chief Justice at the time and place aforesaid, and the said Chief Justice has postponed said case to the Supreme Court of the United States at the next session thereof, and admitted the said Curtis to bail in the sum of two thousand dollars to appear before said Court and prosecute said writ;

Now, therefore, the condition of this obligation is such that if the above bounden Newton Martin Curtis shall appear before the said Court at said next session and prosecute his said writ and abide the order of the Court thereof, then the above obligation to be void, otherwise to remain in full force and virtue.

NEWTON MARTIN CURTIS. [L. S.]
WM. A. JONES. [L. S.]
SIDNEY DE KAY. [L. S.]

Sealed and signed in the presence of

F. G. SAMPSON.

INDEX.

PAGE

Indictment 1
Demurrer 5
Exhibit 12 6
Exhibits 1 and 2 7
Exhibit 3 8
John W. Vrooman:
Direct Examination 11
Cross " 18
Re-direct " 20
Exhibit 4 13
Edward M. Johnson:
Direct 23
Charles W. Beebee:
Direct 25
Cross 28
Recalled 44
Adolph Plattenner:
Exhibit 13 29
Charles Treichel:
Direct 30
Cross 36
Peter Vogelsang:
Direct 37
Cross 39
Re-direct (Recalled) 45
Re-cross 46
John Van Arsdale:
Direct 41
Exhibit 21 42
" 22 43
" 24 44
" 25 49
Admission and Exhibit 7 50
Motion to direct verdict for defendant 50

Ruling of the Court thereon and exceptions..... 51
Charge to the jury..... 51
First, second and third exceptions (to instructions given or refused)..... 56
Fourth, fifth, sixth and seventh exceptions (to instructions given or refused)..... 57
Statement of verdict..... 58
Stay, and notice of motion..... 58
Settlement of case by Judge..... 59

Circuit Court of the United States,

FOR THE SOUTHERN DISTRICT OF NEW YORK—IN THE SECOND CIRCUIT.

MAY TERM, 1882.

THE UNITED STATES

AGAINST

NEWTON MARTIN CURTIS.

No. 85.
Motion for a New Trial and in Arrest of Judgment.

This is an indictment found at the March Term, 1882, of this Court, against the respondent for violation of the Act approved August 15th, 1876, Chapter 287, Section 6, (19 U. S. Stats. at Large, 169, and Richardson's Supplement, page 245).

The indictment contained eleven counts, but as the defendant was convicted only upon the first and eighth counts, all the others are omitted in settling this case, as well as all the testimony bearing *exclusively* upon the omitted counts.

The caption of the indictment and the first and eighth counts are as follows:

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,

FOR THE SOUTHERN DISTRICT OF NEW YORK—IN THE SECOND CIRCUIT.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the District and Circuit aforesaid, on the second Wed-

nesday of March, in the year of our Lord one thousand eight hundred and eighty-two, and continued by adjournment to and including the ninth day of May, in the year of our Lord one thousand eight hundred and eighty-two.

SOUTHERN DISTRICT OF NEW YORK, ss.:

The Jurors of the United States of America within and for the District and Circuit aforesaid, on their oath, present that Newton Martin Curtis, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the seventeenth day of October, in the year of our Lord one thousand eight hundred and eighty-one, at the Southern District of New York, and within the jurisdiction of this Court, he, the said Newton Martin Curtis, being then and there an employee of the the United States, not appointed by the President of the United States, with the advice and consent of the Senate of the United States, to wit, an employee of and compensated for his services in the sum of five hundred dollars each month by the Treasury Department of the United States, having theretofore been employed, at the compensation aforesaid, by the Secretary of the Treasury of the United States, and then and there acting as an expert for the United States, to investigate certain cases and matters pending in the Courts of the United States, in which the United States were interested, a more particular and definite description of the employment, duties and compensation of him, the said Newton Martin Curtis, as such employee, being as yet to the jurors aforesaid unknown, did unlawfully and knowingly receive from one Peter Vogelsang the sum of five dollars for political purposes; that is to say, money to the amount of five dollars was then and there paid by him, the said Peter Vogelsang, to and received by him, the said Newton Martin Curtis, knowingly, for the treasury of a certain political organization and body, of which he, the said Newton Martin Curtis, was then and there a member, known as the Republican State Committee of the State of New York, for the purpose of defraying the expenses of said committee in and about a certain political campaign then and there pending, and then and there managed by said

committee on behalf of a certain political party known as the Republican party, a more particular and definite description of which said purposes being to the jurors aforesaid as yet unknown, he, the said Peter Vogelsang, as he, the said Newton Martin Curtis, then and there well knew, being then and there an employee of the Government of the United States, not appointed by the President of the United States with the advice and consent of the Senate of the United States, to wit, a messenger in the Custom House of the United States at the City of New York, and as such messenger compensated by the United States, then and there, against the peace of the United States and their dignity, and against the form of the statute of the said United States in such case made and provided."

* * * * * * * * * *

EIGHTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Newton Martin Curtis, late of the City and County of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twentieth day of October, in the year of our Lord one thousand eight hundred and eighty-one, at the Southern District of New York, and within the jurisdiction of this Court, he, the said Newton Martin Curtis, being then and there an employee of the United States, not appointed by the President of the United States, with the advice and consent of the Senate of the United States, to wit, an employee of and compensated for his services in the sum of five hundred dollars each month by the Treasury Department of the United States, having theretofore been employed, at the compensation aforesaid, by the Secretary of the Treasury of the United States, and then and there acting as an expert for the United States, to investigate certain cases and matters pending in the Courts of the United States, in which the United States were interested, a more particular and definite description of the employment, duties and compensation of him, the said Newton Martin Curtis, as such employee, being as yet to the jurors aforesaid unknown, did unlawfully and knowingly receive from one Charles Treichel, a certain thing of value, to wit, the bank check of the said Charles Treichel, payable to

the order of him, the said Newton Martin Curtis, of the denomination and value of one hundred dollars, for political purposes, that is to say, for the treasury of a certain political organization and body, of which he, the said Newton Martin Curtis, was then and there a member, known as the Republican State Committee of the State of New York, for the purpose of defraying the expenses of said committee in and about a certain political campaign then and there pending, and then and there managed by said committee, on behalf of a certain political party known as the Republican party, a more particular and definite description of which, said purposes being to the jurors aforesaid as yet unknown, he, the said Charles Treichel, as he, the said Newton Martin Curtis then and there well knew, being then and there an employee of the Government of the United States, not appointed by the President of the United States, with the advice and consent of the Senate of the United States, to wit, an auditor in the Custom House of the United States, at the City of New York, and in the office of the Collector for the Port and Collection District of the said City of New York, and as such auditor, compensated by the United States, then and there, against the peace of the United States and their dignity, and against the form of the statute of the said United States in such case made and provided."

* * * * * * * * * *

"STEWART L. WOODFORD,
"United States Attorney."

A true bill.

Foreman.

To this indictment a general demurrer was filed, which was overruled by the Court, to which the defendant took an exception, which was allowed.

CIRCUIT COURT OF THE UNITED STATES, 17

FOR THE SOUTHERN DISTRICT OF NEW YORK—IN THE SECOND CIRCUIT.

MAY TERM, A. D. 1882.

UNITED STATES, by indictment,

AGAINST

NEWTON MARTIN CURTIS. 18

And the said Newton Martin Curtis, in his own proper person, cometh into Court here, and having heard the said indictment read, saith, that the said indictment, and the matters therein contained, in manner and form, as the same are above stated and set forth, are not sufficient in law, and that he is not bound by the law of the land to answer the same, and this he is ready to verify. Wherefore, for want of a sufficient indictment in this behalf, the 19
said Newton Martin Curtis prays judgment, and that by this Court here he may be dismissed and discharged from the said premises in the said indictment specified.

NEWTON MARTIN CURTIS.

I certify that, in my opinion, the foregoing demurrer is well founded in law, and that it is not intended for delay.

EDWIN B. SMITH,
Defendant's Counsel. 20

STANLEY, CLARKE & SMITH,
Attorneys for Defendant,
160 Broadway.

The defendant was then called to the bar to plead to the indictment, and a plea of "not guilty" was entered.

A jury was then empaneled and sworn, and the cause opened by William P. Fiero, Esquire, Assistant United States Attorney, on the part of the government.

21 The following testimony and evidence was then given, and the below-stated proceedings had upon the trial; the same being *all* the testimony, evidence and proceedings having any relation whatever to the first and eighth counts of the indictment.

The District Attorney, in support of the indictment, and of each count thereof, introduced certified copies of these three communications from the Treasury Department to the defendant, marked
22 Exhibits 12, 1 and 2:

Exhibit 12.

"TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., Jan. 15, 1880.

N. M. CURTIS, Esq.,
New York:

SIR—Pursuant to the recommendations of the United States Attorney for the Southern District of
23 New York, concurred in by the Attorney-General and the Collector of Customs at New York, you are hereby employed as an expert to investigate the cases now pending in the United States Court, at the above named-port, known as the "Charges and Commission Cases," for the purpose of ascertaining how many of such cases are based upon fraudulent protests and practices, in whole or in part, and preparing them for settlement.

You will report to the District Attorney the result of your investigation in each case, with a view to final disposition thereof. Your compensation while en-
24 gaged upon this service, will be five hundred dollars ($500) per month from the 16th instant, such sum to cover all expenses, to be paid upon vouchers duly approved by the District Attorney, and accompanied in each case by a copy of this letter.

It is desired that the utmost dilligence shall be used by you in the examination of the cases referred to, to the end that they may be finally disposed of during the present calendar year.

Very respectfully,
JOHN SHERMAN,
Secretary."

Exhibit 1.

"TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., March 1, 1881.

N. M. CURTIS, Esq.,
New York City.

SIR—The Department has received your letter of the 24th ultimo, reporting your progress in the disposition of the Charges and Commission Cases under your charge.

It is desirable that these cases shall be disposed of within the next two months, and your employment under Department letter of January 15th, 1880, will continue until the first of May next, at which time it will terminate.

Very respectfully,
JOHN SHERMAN,
Secretary."

Exhibit 2.

"TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., April 14, 1881.

N. M. CURTIS, Esq.,
New York City:

SIR—Referring to Department letter of March 1, 1881, relative to your employment in connection with the Charges and Commission Cases, I have to state that you will be continued in charge of said cases, until otherwise ordered, at a compensation of five hundred dollars per month, as fixed by Department letter of January 15, 1880.

Very respectfully,
WILLIAM WINDOM,
Secretary."

MR. FIERO also offers in evidence letter of the defendant to the Secretary of the Treasury, dated January 13, 1882.

MR. SMITH: I object to the signature, and I object that it purports to be, on the face of it, an original letter to the Treasury Department, and from the records of the Treasury Department, I suppose. I understand that if they wish to prove anything from the records of the Treasury Department, a certified copy of the records is the true evidence,

29 and not a letter which purports to be addressed there, with no evidence that it ever was delivered there or anything about it. There is no evidence that it *ever* reached the Treasury Department.

THE COURT: What is the object of this paper?

MR. FIERO: First, I offer it in evidence to show that the defendant was a member of the Republican State Committee of the State of New York, was the treasurer of that committee, and that he admitted in that letter that he was liable for the actions of
30 the committee, being a member of the Executive Committee also. It admits the character of his employment, as well, under the Treasury Department, and is an original letter.

THE COURT: Prove the signature.

Gen. Curtis' signature proved by Adolph Plattner.

MR. FIERO: Now I offer the letter.

MR. SMITH: We object.

31 Paper admitted in evidence. Defendant's counsel except to its admission on all the grounds stated in the objection.

Letter marked "Exhibit 3," as follows:

Exhibit 3.

"CUSTOM HOUSE, N. Y., Jan. 13, 1882.

"Honorable CHARLES J. FOLGER,

"Secretary of the Treasury:

"SIR—I have the honor to acknowledge the receipt of your letter, J. B. B., of the 9th inst., stating that
32 "The Civil Service Reform Association of the City of New York, through its President, Secretary, and Executive Committee, have preferred charges against you, alleging the violation of Sec. 6, Chap. 287 of the U. S. Statutes, 1876," which section you quote, and further state that the "specifications under this charge is, that you, holding your position under this department, were elected Treasurer of the Republican State Committee of New York, and served as such during the canvass preceding the last election; that you also served as a member of the Executive Committee of the State, and was widely published through the public prints and pub-

lications of that committee as its treasurer; that 33
said Republican Committee issued a letter to the employees of the United States, employed in the State of New York, requesting from each of them a contribution of a fixed amount of money, which was equal, in each case, to a certain percentage of their respective salaries, for the purpose of defraying the expenses of the Republican canvass. They allege that you participated in levying these assessments, and in this, charge a flagrant violation of the statute above quoted. They allege that these payments were made, in many instances, at great personal sacrifice, in consequence of the fear of the 34
office-holder that they might lose their office and means of livelihood should they refuse, either through the success of the party out of power, or through dismissal by the party in power, as punishment for not having paid them; further they allege, that large sums of money were paid by Federal employees in the State of New York to you, in reply to the letter of the Republican Committee above referred to. They specifically charge that one or more Federal employees who paid the amount of the assessment did so by check payable to your order or cash to you personally." In communicat- 35
ing to me this summary of the charges referred to, you state: "These charges, if substantiated, would seem to merit my most serious consideration, with a view to the enforcement of the sanction provided for the violation of this section," and ask my "early attention in reply to the same."

I have the honor to state in reply to these charges:

1st. I am not, and have not been, since January 15th, 1880, an executive officer nor such employee of the United States as is referred to in Sec. 6, Chap. 287, Statute 1876. In my view, that section was only intended to apply to officers and employees 36
who stand in such relations to the Government as properly to subject them and their conduct to the supervision and discipline of those placed over them, or as gives them rights of supervision and discipline over others, relations which I have not sustained since the commencement of my present engagement. Department letters of January 15th, 1880, and March 1st, 1881, and April 14th, 1881, copies of which are herewith transmitted relating to the subject, show that I was specially employed as an expert to investigate certain suits then pending in the United States Circuit Court for the Southern District

of New York, and ascertain how many of such cases are based upon fraudulent protests and practices, and to report the result of my investigation in each case to the United States Attorney, with a view of their final disposition,' and I have not at any time examined into nor reported to any officer or Department of the Government upon the conduct of any Federal officer or employee, nor has it been any part of my duty to make any such investigation or report. If such employment can render me amenable to the provisions of the section referred to, then all persons employed as special counsel, attorneys-at-law, or, in fact, experts or examiners of accounts or records, merchant appraisers, contractors and even common laborers, however special or transient their employment, would come within its provisions.

2d. I had the honor of being elected a member of the Republican State Committee of New York, and by my associates was chosen Treasurer, and I served as such during the canvass preceding the last election, and was a member of the Executive Committee, but I deny that I personally levied assessments on employees or others, or requested any person to make contributions, either by letter or verbal request, other than I may be chargeable with acts done by the committee through its Secretary, nor did I receive, personally or otherwise, by check or cash, any money for the use of said committee that I did not understand and believe the contributors willingly paid without duress or fear of any kind.

It was extensively published in the journals of the city and State, as having been announced by prominent Federal officials and members of the State Committee, and it was universally known that no officer or employee should suffer by reason of his not contributing to the expenses of the canvass.

I know that contributions were returned by the committee to those who intimated that payments were attended with inconvenience. If I am in error as to the application of this provision, I am in error with others with whom I conferred at the time this question was first brought to public notice. I believe in the principles and policy of the party to which I belong, and have been in the past, and shall I hope in the future be ready to sustain my honest convictions with my best ability, but I have not, and would not intentionally serve it in contraven-

tion of law, or in conflict with methods approved by wise and good men. I particularly and specifically deny that I violated or intended to violate or disregard the letter or spirit of the section referred to. 41

If there is involved anything relating to the propriety, utility, importance or continuance of my services in this connection, I desire an opportunity to lay before you a full statement of the services rendered and the results accomplished.

Very respectfully,

N. M. CURTIS."

42

JOHN W. VROOMAN, a witness called on behalf of the plaintiff, being duly affirmed, testified as follows:

BY MR. FIERO: Q. What is your business?

A. I am a lawyer by profession.

Q. You were Secretary of the Republican State Committee last fall?

A. I was, sir.

Q. During the months of September, October and November? 43

A. During the months of October and—yes, sir.

Q. You were the secretary of that committee?

A. Yes, sir.

Q. The party known as the Republican party is not a religious organization, is it—is it a political party?

THE COURT: Why do you ask that question?

Mr. FIERO: I ask if it is a political party?

THE WITNESS: Yes, sir. 44

Q. It is a political party?

A. It is.

Q. And the Republican State Committee that you speak of, is a committee of that party to prosecute the campaign for the party?

A. Yes, sir.

Q. Did it prosecute such a campaign last fall?

A. It did.

Q. It was a State campaign, was it?

A. It was.

45 Q. For the election of State officers?

A. It was, sir.

Q. And members of Congress, as well?

Q. The campaign then pending was for the election of State officers and for members of Congress?

A. I said for the election of State officers.

Q. And for members of Congress?

A. Not generally; no, sir.

Q. Specially for the election of members of Congress?

46 Objected to as not being the best evidence, and excluded.

Q. The State Committee prosecuted the campaign for the Republican party?

A. It did.

Q. Received contributions of money?

A. It did, sir.

Q. And disbursed the same?

A. Yes, sir.

47 Q. Through the defendant?

Q. Was the defendant a member of that committee?

A. He was.

Q. Did he hold any office under the committee?

A. He did.

Q. What?

A. Treasurer.

Q. Who received the money—to whom was it paid finally?

48 A. To the Treasurer.

Q. Who disbursed it?

A. It was disbursed by the Committee upon checks—

Q. Of the Treasurer?

A. Of the Treasurer and Chairman.

Q. The defendant?

Q. By the Treasurer you mean the defendant?

A. I do.

Q. (Paper shown to witness.) Please look at this

circular that I show you. Was that issued by the committee? 49

Objected to on the ground that it does not affect the defendant, unless he is shown to have connected himself with it; that he is simply shown to have been a member of the committee, and it does not follow that he participated in every act of the committee or is made criminally liable by every act of the committeee; that he cannot be affected by anything that the committee did unless he 50 was connected with it.

THE COURT: This circular is admissible as a circumstance tending to show the purpose for which the money was contributed.

MR. FIERO: That is all for which I offer it.

MR. SMITH: We object, that they should connect General Curtis with it, because as a matter of fact it was issued without his knowledge, and I therefore object to its being put in, as something done without his knowledge. 51

MR. FIERO: It is only to show the purposes of the contribution.

The Court permits proof to be offered that there was such a circular in existence, as bearing only on the question of the purposes for which the money was raised.

MR. SMITH: We except.

Q. That was issued by the committee?
A. Yes, sir. 52
Q. And signed by you as Secretary?
A. Yes, sir.

Paper marked "Exhibit 4," as follows:

"State of New York,
Republican State Committee,
Fifth Avenue Hotel.

NEW YORK, October 11th, 1881.

DEAR SIR:

The Republican State Committee beg leave to

53 respectfully remind you of the unusual importance of the approaching election in the State of New York. In the belief that, upon consideration of the great interests involved, you may judge it proper to assist the committee, we respectfully suggest that you contribute $120 on or before Nov. 2d, for the purpose of defraying the necessary expenses of the campaign.

Checks or postal orders should be made payable to the order of Gen. N. M. Curtis, Treasurer.

Very respectfully,

JOHN W. VROOMAN,

54 Secretary."

Q. That was sent around, to a great extent, to different persons?

A. It was sent to different persons.

Q. Employes of the Government and otherwise, I presume—it was not exclusively confined to employes?

A. No, sir.

55 Q. The amounts were not always $120?

A. No, sir.

Q. They varied?

A. Yes, sir. I desire to state, in addition to that, in very many circulars no amount at all was specified.

Q. What was the character of those circulars where no amount was put in; were they put blank?

A. Simply a contribution.

Q. Were they worded like this in every respect?

56 A. I do not remember the wording.

Q. They were not like that?

A. I do not remember; they were substantially.

Q. In the practice of the committee there, and the officers of the committee, who received the money—according to the practice and custom of the committee?

Objected to, that they have charged the defendant with receiving money from particular individuals, that it is competent for them to prove that he did receive money from those

individuals; but is entirely immaterial who received the money usually; that the defendant is only liable for the money that he received. 57

Q. (Another paper shown to witness.) Did you sign that?

A. No, sir; it is written by Mr. Edward M. Johnson.

Q. Who was Mr. Edward M. Johnson? You say that was signed by Mr. Edward M. Johnson.

A. That was written by Mr. Edward M. Johnson; 58 yes, sir.

Q. Who was he?

A. He was a former secretary of the Republican State Committee; he was then assisting the committee.

Q. The committee?

A. Yes, sir.

Q. What became of the money received on these receipts, that these receipts called for?

Q. What was Mr. Johnson's position with the 59 committee?

Objected to, that he should first prove his connection with the defendant. Question allowed. Defendant excepts, unless it is connected with the defendant.

Q. What was his position with the committee?

A. He was assisting the committee. I suppose you might call him one of the clerks of the committee. 60

Q. Did the defendant know of his being there, his employment there?

A. Yes, sir.

Q. Was Johnson receiving money?

A. He did, sir.

Paper marked for identification, Exhibit 5.

Q. (Another paper shown to witness.) This one I show you; who wrote that?

A. That is in my handwriting.

61 Q. This one that I have just shown you is in your handwriting?

A. Yes, sir.

Q. And you received that $5, did you?

Q. What became of the $5 that this receipt calls for?

Q. This receipt that I have shown you calls for $5 from Peter Vogelsang—you have seen it?

A. Yes, sir.

Q. Did you pay that to the defendant?

62 Objected to. Objection overruled. Defendant excepts.

Q. Did you pay that to General Curtis?

A. I put it in the fund.

Q. It went to him?

A. Yes, sir.

THE COURT: The question is whether you paid that $5 to this defendant?

THE WITNESS: I paid generally; I paid $5 over
63 to the treasury.

BY MR. SMITH: Q. What did you say?

A. It was paid into the treasury of the Republican State Committee.

BY THE COURT: Q. The question was what you did with the $5 when you got it?

A. I have answered the question.

Q. You handed it to whom?

A. I put it into the treasury of the Republican State Committee.

64 Q. You handed it, then, to this defendant, did you?

A. I can't state; I may have handed it to some one else; I can't say that I handed that particular $5 to General Curtis.

Paper marked "No. 6" for identification.

Q. (Another paper handed to witness.) This paper is a receipt to Isaac Trimble; $10. In whose handwriting is that?

A. Mr. Edward M. Johnson.

Q. He is the same Mr. Johnson that you spoke of as being connected with the committee? 65

A. Yes, sir.

Paper marked No. 7 for identification.

Q. (Another paper shown to witness.) I show you another one. In whose handwriting is that?

A. Colonel Anson S. Wood.

Q. What was his connection with the committee?

A. He was the Assistant Secretary of the committee. 66

Paper marked No. 8 for identification.

Q. Were yourself, Mr. Johnson and Mr. Wood the only ones who received money there?

A. Yes, sir; with the exceptional cases; if we happened to be at our meals, some of the clerks would temporarily receipt.

Q. What was done with the money after it was received?

THE WITNESS: I want that understood. I said I paid it into the treasury of the committee. 67

Q. How paid in?

A. I mean as paid into any society or organization, into the treasury.

BY THE COURT: Q. What did you do with the money, is what the District Attorney wants to know?

A. I can't answer, it seems to me, any more specific than that.

BY MR. FIERO: Q. Paying into the treasury?

A. Yes, sir. 68

Q. The point is, what do you mean by that? What was the *modus operandi* of paying it into the treasury? For instance, did you have a drawer that you put it in, and who did you give it to, and what was done with it?

A. It was usually furnished to the Treasurer.

Q. To the defendant?

A. Yes, sir.

Q. Are you able to swear that this amount of $5,

69 the one that you have identified here, is in your handwriting? I think you have identified only one?

A. Only one.

Q. Only one of these receipts?

A. Yes, sir.

Q. Are you positive about that other being Mr. Johnson's handwriting? It looks a good deal like yours; you write very much alike.

A. That is Mr. Johnson's.

Q. Are you able to say that that took the same
70 course?

A. I can't swear positively with reference to any particular item.

Q. To the best of your belief?

A. Yes, sir.

Q. Did that take the same course?

Q. Have you any doubt that that was paid?

THE WITNESS: I desire to explain about this money, so far as my evidence is concerned. The money was all paid into the treasury of the com-
71 mittee, except now and then small items of petty cash, which were paid out for expenses; this $5 may have been paid out for petty cash expenses, or may have been put into the treasury.

Q. But it went toward the expenses of the committee all the same?

A. Yes, sir.

CROSS-EXAMINATION BY MR. SMITH:

Q. Those small items that you speak of being
72 paid out, petty items, I suppose one thing and another, the money never absolutely came into the teasurer's hands, did it?

A. No, sir; I frequently paid those out myself.

Q. For all you know, you paid out this Peter Vogelsang's money personally in that way?

A. I have not the slightest recollection about it.

Q. You don't know anything about Peter Vogelsang's money, nor anybody else's money, do you?

A. No, sir.

Q. Nor this $5.

A. No, sir. 73

Q. Except it is a receipt to which you signed Curtis' name?

A. The money was accepted all right; that is all I know about it.

Q. Do you know what money it was—do you know whether it was gold or silver, or a national bank note, or a greenback?

A. No, sir; I have not the slightest recollection.

Q. You don't know anything about it?

A. No, sir. 74

Q. About this circular that has been referred to, and has been read here, is it or is it not true that you prepared that circular of your own motion? Do you recollect whether or not you did consult General Curtis about that circular?

A. No, I don't think I ever did.

Q. Had you been connected with the committee the previous year?

A. The previous year, yes, sir.

Q. Won't you try and recollect and say whether 75 or not you issued that circular as a matter of course, without saying anything to the committee about it in the first instance, or whether the committee acted?

A. I have no distinct recollection about it now.

Q. You have no recollection that the committee did act on that first circular?

A. I can't swear positively whether they did or did not; it was the usual practice of the committee, and I can't say whether the committee formally 76 acted upon it or not.

Q. Let me try to refresh your recollection. Didn't General Curtis bring you a letter which said "No money for a damned Half-breed," and ask you what it meant, and you told him you had issued this circular, and that was the first he ever knew about it?

A. It may have occurred, but I have no recollection of it.

77 Q. Did General Curtis ever give you any authority to sign his name to receipts?

A. Not that I ever remember of, sir.

Q. You simply signed it because the money came into the hands of the committee?

A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. FIERO:

Q. Did he know of your signing receipts?

A. Well, I don't know that I can answer that
78 question.

Q. Did he visit the committee rooms?

A. Yes, sir.

Q. How often?

A. Frequently.

Q. Knew about what was going forward in the committee room?

Q. He did visit the committee room often, you said?

A. Yes, sir.

79 Q. He knew all of you gentlemen there, did he?

A. Yes, sir.

Q. You say you can't answer the question whether he knew that you were signing receipts or not?

A. Well, I have no absolute certainty, sir; I don't know what his mental operations were—whether he knew or not; I can't swear positively whether he knew or not; I don't know what his mental operations were.

80 Q. What do you mean by his "mental operations?"

A. I mean by that that I don't know whether he had personal knowledge of it or not; I can't answer for him.

Q. But did he have any observation that you would naturally think would make him know what you were doing?

THE WITNESS: If you ask my opinion, I will give it.

MR. FIERO: The opinion is not competent.

THE WITNESS: I can give you my opinion, but to 81
a certainty I cannot.

Q. What did he see?

A. I suppose he saw generally the persons in the committee room.

Q. Was he there when any money was received?

THE WITNESS: I can give you my opinion, but I can't swear positively.

Q. Can't you identify any occasion when he was there and saw you?

A. No, sir; you mean any specific occasion. He 82
was there a great many times.

Q. Any general occasion when he was there—you needn't speak of it specifically—any time when he happened to be in there and saw any one of you three gentlemen of whom you have been testifying. Can you recollect now, refreshing your memory, I will give you a plenty of time to do it, any time when he was in there when any one of you gentlemen received money and signed receipts?

A. I can give you no positive answer except an 83
opinion.

Q. Can you remember that he was in there generally, not on a specific occasion?

Q. But on a day when money was paid and receipts were signed?

A. I have no remembrance of any especial occasion and generally I can't state with any positive certainty on that, I can only give you my opinion; that I will give you if the Court desire.

Q. You recollect seeing him there—your opinion 84
is founded upon your best recollection, isn't it?

A. Yes, sir.

Q From your best recollection?

A. Yes, sir.

Q. From your best recollection as to the persons in that committee room did you see him there when money was received and receipts signed?

Q. From your best recollection?

Objected to on the ground that he has already stated he had no recollection; and also

85 on the ground that the attempt is to prove the authority of this particular man to sign a receipt for General Curtis, and he is asked if he was there when he saw any receipt signed.

MR. FIERO: Any of these three men?

DEFENDANT'S COUNSEL: We object to that also, as it does not follow that because he gave authority to one that he also gave authority to Mr. Vrooman; that authority
86 given to Mr. Wood is not any evidence whatever that he gave authority to Mr. Vrooman.

MR. SMITH: My point is that he is asked if, according to his best recollection, he thinks that General Curtis was present at the time when either of these parties signed a receipt for him.

My objection is that it would not have any legal tendency to prove an authority in John W. Vrooman if he did think that General
87 Curtis saw Anson S. Wood sign.

Question allowed.

Defendant excepts.

THE WITNESS: If I may be permitted to, by way of explanation, render myself understood, I desire to state that General Curtis did not visit the committee rooms every day, and when there he did not remain any length of time; he was not a constant attendant upon the committee rooms.

88 Q. Not a constant attendant?

A. No, sir; he was not there a great deal of time.

Q. And that makes it difficult for you to recollect?

A. Yes, sir; that makes it difficult for me to recollect, because he was there but little.

Q. Now, I want your best recollection about that?

Objected to. Question allowed. Defendant excepts.

Q. What is your best recollection?

A. I am unable to state specifically whether he

was present or not; he might have been present upon occasions of that kind. 89

Q. Then you have not any recollection on the subject?

A. No, sir.

By Mr. Smith: Q. Isn't it true that you and others complained very much that General Curtis was there so little and so seldom?

A. Yes, sir; we did.

Edward M. Johnson, a witness called on behalf of the plaintiffs, being duly sworn, testified as follows:— 90

By Mr. Fiero:

Q. Were you connected with this committee, the Republican State Committee, last fall?

A. Yes, sir.

Q. In what capacity?

A. As a clerk.

Please look at the paper that is marked for identification 5, and see if that is your in handwriting (paper handed to witness)? 91

A. Yes, sir.

Q. You signed the name "N. M. Curtis," there?

Q. Do you rememder from whom you received that money?

A. I presume I received it from the party.

Q. Did you say you were assistant there?

A. Clerk.

Q. Do you know about the practice of receiving money there? 92

A. Yes, sir.

Q. What was done with the money that was received?

A. When I was the secretary of the Committee, I always put it in the bank.

Q. That was some time ago?

A. A year ago.

Q. A year ago last fall?

A. This time I paid it all to the secretary.

93 Q. Mr. Vrooman?

A. Mr. Vrooman.

Q. You didn't pay any to Mr. Curtis?

A. No, sir; not a cent; I wish to correct myself, not a cent of the money.

Q. What did you turn over?

A. There was one check that I returned to Mr. Curtis.

Q. Do you remember that check?

A. That was from George William Curtis.

94 Q. That you paid?

A. That I handed to Mr. Curtis.

Q. He is not a Government employee, is he?

A. Not that I know.

Q. You never heard of his being a Government employee?

A. No, sir.

Q. With regard to the practice of signing receipts there, who signed the receipts?

A. When the money was paid to me, I signed.

95 Q. By what authority did you sign?

A. No authority whatever, only custom.

Q. What was the course of the committee as to receiving funds?

A. The party receiving the money always signed the Treasurer's name.

Objected to. Objection overruled, and defendant excepted.

Q. Always signed the Treasurer's name?

96 A. Yes, sir.

Q. Was that known by the Treasurer?

A. That I don't know.

Q. Have you any recollection of either one of you gentlemen, Mr. Vrooman, Mr. Wood or yourself—signing receipts when the defendant was present?

A. All I can answer is for myself.

Q. For yourself?

A. I don't remember of his being present when I signed his name.

Q. You don't?

A. No, sir; and I don't think that he was present. 97

Q. Refreshing your memory about that, can't you remember any time when he was present when receipts were signed by either one of you?

A. All I can answer for is myself.

Q. Didn't you see any of the others sign receipts?

A. I didn't.

Q. Never saw one of the others sign receipts?

A. No, sir.

Q. Where were you in that office?

A. I was in the office of the Secretary, but when 98
he went out I was generally there—when the Secretary went out I stayed there.

Q. You stayed in the Secretary's office?

A. Yes, sir.

Q. The custom of the committee was, as I understand, for those who received the money connected with the committee, to sign the Treasurer's name?

A. Yes, sir.

Q. Was this money, mentioned in Exhibit 5, which you have identified as your handwriting, paid to you 99
in the committee rooms?

Objected to on the ground that the indictment is not against Mr. Johnson. Question allowed. Defendant excepts.

Q. Was it paid in the committee room?

A. I presume it was. I never received any money in any other place.

Q. It was paid there?

A. I presume that it was. 100

Q. I think you said that the money you received you paid over to the Treasurer?

A. No, sir; I paid it to the Secretary.

Q. You paid none to the Treasurer?

A. I paid none to the Treasurer.

CHARLES W. BEEBE, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

BY MR. FIERO: Q. What is your business?

101 A. Assistant receiving teller, Second National Bank.

Q. Second National Bank, City of New York?

A. Yes, sir.

Q. Do you know the defendant?

A. Yes, sir.

Q. Did you have business transactions with him last fall?

A. Yes, sir.

Q. Did he deposit money?

102 A. Yes, sir.

Q. And received money from your bank?

A. I couldn't say that.

Q. He deposited money?

A. He deposited money, yes, sir.

Q. In checks?

A. Checks and bills, and sometimes gold.

Q. In what capacity did he make those deposits —in a representative capacity or personally?

A. Well, he generally made the deposit himself.

103 Q. The physical part of it was he himself in his own person, but what I mean is, did he do it in the name of N. M. Curtis alone, or N. M. Curtis as Treasurer?

A. Deposited to the credit of the Republican State Committee, and with his endorsement, "N. M. Curtis."

Q. "N. M. Curtis, Treasurer?"

A. Treasurer, yes.

Q. Check (handed to witness) Please look at the

104 paper which I now show you, and look at the back of it. Has that been through your bank?

A. Yes, sir.

Q. Those endorsements you recognize?

A. Yes, sir.

Q. And it has been through your bank?

A. Yes, sir.

Q. And paid?

A. Yes, sir.

Q. By your bank?

A. Yes, sir.

Q. Credited to the Republican State Committee? 105

A. To the Republican State Committee.

Q. Look at the under endorsement, under the name there. What is that; is it yours, your bank stamp?

Q. That is your stamp?

A. That is our stamp.

Q. That is all made in the bank?

A. Yes, sir.

MR. FIERO: I offer that part of it in evidence, and the check for identification. 106

Q. It is your endorsement?

A. Yes, sir.

Q. That under the name?

A. Yes, sir; "Endorsement correct, Second National Bank, New York."

Q. Commencing at the word "Endorsement" and closing with the word "York?"

A. Yes, sir.

Q. And you recognize it as having been deposited 107 in your bank?

A. Yes, sir.

Q. To the credit—

A. Of the Republican State Committee, yes sir.

Marked 9 for identification.

Q. Have you the signature book of the bank here?

A. Yes, sir.

Q. [Book handed to witness.] Just turn and see if you find the name of "N. M. Curtis, treasurer," 108 there?

A. Page 25, it is there.

Q. That you identify?

A. Yes, sir.

Q. How long a time did these transactions continue; during what months were they?

A. I couldn't say exactly when the account was opened.

Q. In October?

A. I couldn't exactly say.

109 Q. You couldn't exactly say?
A. No, sir.

CROSS-EXAMINATION BY MR. CLARKE:

Q. Whose is the signature just above that of "N. M. Curtis" on that book?
A. B. Platt Carpenter.
Q. Read the signatures above them?
A. [Reading] "B. P. Carpenter, Chairman of the Republican State Committee; N. M. Curtis,
110 Treasurer Republican State Committee."
Q. Requiring both those signatures to draw checks on deposits to the credit of the Republican State Committee, did it not?
A. I couldn't say as to that; the account was opened with the cashier of the bank.
Q. The account was kept in the name of the Republican State Committee?
A. The Republican State Committee.
Q. Those two signatures were put there at the
111 same time?
A. I believe they were.

ADOLPH PLATTNER, RECALLED.

BY MR. FIERO: Q. (Book shown to witness) Look at this signature book, "N. M. Curtis, Treasurer;" whose handwriting is that?
A. N. M. Curtis; it is General Curtis' handwriting.
Q. The defendant?
112 A. Yes, sir.

The signature is considered as being Exhibit 10, though not marked.

Q. [Check shown witness] This indorsement is General Curtis' handwriting?
A. Yes, sir.

Mr. Fiero also offers in evidence certified copy of the notice of the election, under the statute, from the New York Revised Statutes, Vol. 1, p. 378, act passed in 1842.

Objected to by Mr. Smith, as immaterial; 113
that if it is material to show that a Representative in Congress was voted for at the last election, it is material to aver it, and there is no such averment in the indictment; and in the second place, if it is material to prove anything of that kind, this paper does not prove it.

Admitted. Defendant excepts.

Marked Exhibit 13, as follows:

114

"STATE OF NEW YORK,
Office of the Secretary of State,
ALBANY, August 11th, 1881.

TO THE SHERIFF OF THE COUNTY OF NEW YORK:

SIR—Notice is hereby given that, at the General Election to be held in this State on the Tuesday succeeding the first Monday of November next (November 8th), the following officers are to be elected, to wit: A Secretary of State, in the place of JOSEPH B. CARR. A Comptroller, in the place of JAMES W. WADSWORTH. A Treasurer, in the place of NATHAN D. WENDELL. 115 An Attorney-General, in the place of HAMILTON WARD. A State Engineer and Surveyor in the place of HORATIO SEYMOUR, JR. An Associate Judge of the Court of Appeals (for a full term) in the place of FRANCIS M. FINCH (appointed by the Governor in the place of CHARLES J. FOLGER, elected Chief Judge), whose term of office will expire on the last day of December next.

A Representative in the Forty-seventh Congress of the United States, for the Ninth Congressional District, in place of FERNANDO WOOD, deceased. A Representative in the Forty-seventh Congress 116 of the United States for the Eleventh Congressional District in place of LEVI P. MORTON, resigned. Six Senators, for the Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Senate Districts, comprised in the City and County of New York, and one Senator for the Fifth Senate District, comprising the County of Richmond and part of the City and County of New York.

County officers, also to be elected for said county, twenty-four Members of Assembly.

A Surrogate, in the place of

117 A District Attorney, in the place of DANIEL G. ROLLINS.

A Superintendent of the Poor, in the place of

Two Justices of the Marine Court, in the place of CHARLES GOEPP and JAMES B. SHERIDAN.

One Coroner, in the place of MORITZ ELLINGER.

Nine Justices of District Courts for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth Judicial Districts of said City and County. All whose terms of office will expire on
118 the last day of December next.

Respectfully yours,
JOSEPH B. CARR,
Secretary of State."

"You are without delay to deliver a copy of the above notice to the Supervisor (or one of the Assessors) of each town or ward in your county; and also to cause a copy of said notice to be published, according to law, once in each week, until the election. [See Laws of 1875, Chapter 482, Section 7.]"

119 "STATE OF NEW YORK,)
Office of the Secretary of State, } ss.:

I have compared the preceding with the copy of the original notice to the Sheriff of the County of New York, filed in this office, and do *hereby certify* the same to be a correct transcript therefrom and of the whole of the said copy.

Witness my hand and the seal of office of the Secretary of State, at the City
[SEAL.] of Albany, this 20th day of May, one thousand eight hundred and
120 eighty-two.

JOSEPH B. CARR,
Secretary of State."

CHARLES TREICHEL, a witness called on behalf of the plaintiff, being duly sworn, testifies as follows:

BY MR. FIERO: Q. Have you your appointment with you?

A. No, sir.

Q. Did you ever receive any written appointment?

A. I received a notice from the Collector telling me that I had been appointed.

Q. That is all you ever received? 121
A. That is all any one ever receives, sir.
Q. Was that a personal note?

Objected to.

Q. Where is that?
A. I don't know, sir; I never kept it; it was of no consequence.
Q. You never kept it?
A. No.
Q. You didn't keep it? 122
A. I didn't keep it.
Q. What was your position?

Objected to.

A. My appointment was from the collector, the collector makes the appointment.
Q. You are auditor?
A. I am the auditor of the Custom House; it is merely a clerk; it is nothing but a clerk's position.
Q. The office is known as auditor?
A. The office is known as auditor. 123
Q. How long have you been there?
A. In the Custom House?

By Mr. Fiero: Q. You never kept any paper of appointment?
A. No, sir.
Q. It was simply a letter?
A. Simply a letter
Q. That you didn't keep? How long did you say you had been auditor there? 124

Objected to on the ground that there is no proof that he is auditor.

Q. You were acting as auditor?
A. I was acting as auditor.
Q. How long?

Objected to on the ground that mere proof that a man is acting is not sufficient in a criminal indictment.

The Court allows the testimony on the ground that it may be shown to be material, and gives the defendant an exception.

125 Q. How long did you say you acted as auditor?

A. I have been auditor twice in the Custom House; my last time only since February last.

Q. Only since February last?

A. Only since February last; I have been auditor before, but at an interval of a few years.

Q. Do you know the defendant in this case?

A. I do.

Q. You saw him, I presume, frequently last fall?

A. Yes, sir; occasionally.

126 Q. Do you remember receiving, last October, a notice from the Republican State Committee?

A. I do.

Q. Have you that notice?

A. I have not, sir.

Q. Have you destroyed it?

A. I destroyed it, I presume; I can't find it.

Q. Did I ask you to look for it?

A. You did.

Q. And you have looked for it?

127 A. I looked for it and couldn't find it.

Q. Do you remember the purport of that notice?

A. Yes, sir; I remember the purport of it.

Q. What was that?

A. It was a request to contribute for the benefit of the Republican party the sum of money, and mentioned it as $100.

Q. Did it tell you anything about checks or money orders, or anything of that sort?

Q. Anything farther?

128 A. Yes, distinctly; it said that checks may be made payable to the order of N. M. Curtis, treasurer.

Q. It said that?

A. Yes, sir.

Q. Did you do anything about that?

A. In the way of response, do you mean?

Q. Yes.

A. I did.

Q. They object to the word response; but did you do anything?

A. I did.

Q. What did you do? 129

A. I drew a check to the order of N. M. Curtis, treasurer—

Q. For how much?

A.—Of the Republican State Committee, for $100, and I put that check in my pocket book and kept it there, hoping to see General Curtis at no distant day; I did. He came into my office. I said, "I generally take pride in sending my money up promptly to the committee; but this time I have held this check, hoping to see you." "He said, 130 "Why?" I said, "Well, simply, I would like to compare; I would like to call your attention to the statute." I turned to the law.

Q. The law against receiving?

A. Against receiving or paying; I didn't care so much about the receiving as I did the paying; I wasn't very particular about General Curtis' case, but I was very decidedly particular about my own. I said, "We will just read this over; I have had this check in my pocket-book for a couple of weeks, but 131 I don't propose to give it to you; I have made up my mind I shan't." He said, "But it was not for me." I said, "I know that, or else I shouldn't give it to you; but I don't know what you are going to do with it, I suppose it will go for wine and cigars, or something of that kind; I don't believe there is any particular intention about it; but, at any rate, we will look at this thing carefully."

Q. This thing?

A. This statute—the law: "Any officer or em- 132 ployee not appointed by the President, by and with the advice and consent of the Senate, who shall receive or pay"—and I said, "This includes paying, if you remember?" "Yes," he said, "but that is all right as far as I am concerned; you are all right; I have looked at that carefully, and there is nothing in that; the District Attorney assured me I am perfectly safe acting in this position." I said, "Yes, but I am thinking of myself more particularly." "Well," he said, "I guess it won't do you any

133 harm." I said, "Well, no. I guess it won't; here is the check; if you will assure me it won't hurt you, I will stand my chances." "Well," he said, "I am perfectly willing to take my chances, having had the opinion of the District Attorney on the subject." So I gave him the check.

Q. You gave him the check?

A. I gave him the check myself, I believe.

Q. What became of that check?

A. I think it was directed, however, in an envelope;

134 I handed it to him.

Q. What became of the check?

A. I presume it went through my bank all right; I don't think I have ever seen my check since; I saw that my balance was right, and destroyed the checks.

Q. It was paid, because the balance was all right?

A. It was paid, because the balance was all right.

Q. You didn't have that check before the grand jury?

A. Oh, no.

135 Q. I asked you if you had it, and you said you had destroyed it?

A. I had destroyed it before that.

Q. [Showing witness stub-book,] see if this is the stub of the check. You have since found that; since you were before the grand jury?

A. Yes, sir; "No. 536, October 15th, 1881; to the order of General N. M. Curtis, Treasurer of the Republican State Committee, $100;" I have no doubt of it.

136 Q. It came back with his endorsement?

A. I have never seen it since; I presume so; the bank are very careful.

The entry of the check on the stub-book is marked Exhibit 20, as follows:

"No. 536. Oct. 15, 1881.

"To the order of Genl. N. M. Curtis, Treas. Rep. "State Comm., $100."

Q. You know the defendant well, do you?

A. Quite well.

Q. And this occurred in your office? 137

A. And this occurred in my office.

Q. While you were acting in your official capacity?

A. Yes, sir.

Q. Have you produced at my request the Register of the employees of the Custom House at New York?

A. No, sir; I didn't understand you to request that; I thought you wanted the pay vouchers.

Q. The pay vouchers for October?

A. October and November. 138

Witness produces bundle of papers.

Q. These are the pay vouchers, are they?

A. Those are the pay vouchers, sir,—not for the whole Custom House, but for the clerks.

Q. Would it take you long to turn to the names that I shall read to you?

A. I think not, sir.

Q. Turn to the pay voucher of Isaac Trimble; and then turn to your own pay vouchers? 139

A. I have mine here, sir.

Q. You have yours there?

A. There is mine, for October.

Q. That is your signature?

A. That is my signature.

Objected to, as not being the proper way of proving an appointment.

THE WITNESS: I think it says "clerk," sir, doesn't it?

Q. Do you know about that,—how about your case? 140

A. My case is similar to every other; the Collector nominates and sends the name to the Secretary of the Treasury—"Sir, I have the honor to nominate so and so, as appointment for Inspector, four dollars per diem." The Department answers, "Your nomination," so and so, "is approved," or "disapproved."

Q. The Department letters making the approvals?

A. In all these cases I will give you if you will

141 give me a list. I will give you the Department letters, making the approvals in all these cases, if you will give me the list; I will do so with pleasure.

CROSS-EXAMINATION BY MR. SMITH:

Q. In the department of the Custom House in which you are, there are auditors and assistant auditors, are there?

A. Yes, sir; an auditor and an assistant auditor.

Q. Prior to February last, February of the current year, you were not auditor, were you?

142 A. No, sir; assistant auditor.

Q. Last fall you were assistant auditor?

A. Yes, sir.

Q. And that is a distinct office from the office of auditor?

A. Yes, sir. Let me correct myself for one moment; it is a distinct office; the auditor and assistant-auditor are merely clerks; it is only a designation.

143 BY MR. FIERO: Q. All you are really is clerks?

BY MR. SMITH: Q. You say that General Curtis told you that he had had the opinion of the District Attorney, and that he was not amenable to this law under which the District Attorney is now prosecuting?

A. Yes, sir; decidely.

Objected to as immaterial.

MR. SMITH: I simply propose, as he has drawn out a part of a conversation, to draw

144 out the whole conversation.

Q. Did or not General Curtis mention the name of the District Attorney who had given him that advice?

Objected to. Question allowed as part of a conversation put in evidence by the government.

A. He did.

Q. Whom did he state gave him that advice?

A. General Stewart L. Woodford. I wish to say

that either voluntarily or involuntarily my response 145
was brought out because I don't propose—I want to protect myself.

Q. You didn't propose to give a part of this conversation and suppress the rest?

A. I want to give the whole thing, because I don't propose to be prosecuted myself, and I was very careful in making—

PETER VOGELSANG, a witness called on behalf of the plaintiff, being duly sworn, testifies as follows: 146

BY MR. FIERO:

Q. (Handing witness a paper.) Have you ever seen this paper before?

A. Yes, sir.

Paper offered in evidence by Mr. Fiero.

Objected to, on the ground that the law provides for an Assistant Secretary of the Treasury, and allows him to act as Secretary of the Treasury, but that there is no provision for anybody to act as Assistant Secretary of 147
the Treasury in the absence of the Assistant Secretary; and on the ground that it is not the letter of appointment, but is simply a statement of something that the Secretary has done; and that it does not appear that the person who signed it is an officer known to the law.

The first objection is withdrawn, and decision reserved as to the others.

148

Q. What was your business last October?

A. Collector's messenger.

Q. What was your business.

A. In the Collector's office, as his messenger.

Question and answer objected to.

Objection overruled and exception taken.

Q. In the Custom House, you say?

A. Yes, sir.

Q. Messenger in the Collector's office?

A. Messenger to the Collector; yes, sir.

149 Q. In October last were you so employed?

A. Yes, sir.

Q. Do you remember receiving a notice from the Republican State Committee in October last?

A. Yes, sir.

Q. What was the purport of that notice?

Q. What has become of that notice?

A. I don't know what has become of it, for it was a customary note; we get one every year, and I paid no attention to it farther than to comply with
150 its request.

Q. Have you looked for it at my request?

A. I did.

Q. Did you find it?

A. No, I did not.

Q. You can't find it?

A. No, sir.

Q. What were its contents?

A. What were its contents? Requesting me to contribute.

151 Q. What?

A. Requesting a contribution in favor of the party.

Q. Did you see the defendant after that?

A. I did.

Q. Come down to the occasion I refer to in the indictment—you know what I refer to. Did you see him the latter part of October or the first of November?

A. The first part of November.

152 Q. Where did you see him?

A. In the collector's office.

Q. You were there?

A. I was.

Q. Did you have any uniform?

A. No, sir.

Q. You wore no uniform except what you have on now?

A. No, sir.

Q. Have you often seen him there in the Collector's office?

A. Yes, sir.

Q. You have been there how long? 153
A. Ten years and more—since 1869.
Q. You saw him there about the first of November, you think?
A. Yes, sir.
Q. Last year?
A. Yes, sir.
Q. Did you have any conversation with him?
A. Yes, sir.
Q. What was that?
A. I requested him to take some money up to the 154
Fifth Avenue Hotel?
Q. What for?
A. To contribute.
Q. Did you tell him what it was?
A. Well, only so far as it was my contribution for the expense of the party.
Q. What did you do with it?
A. I gave it to him to take up there.
Q. You gave it to him to take up there?
A. Yes. 155
Q. And he took it from you?
A. Yes, sir.
Q. In the Custom House?
A. Yes, sir.
Q. How much?
A. Five dollars.
Q. Was that the last you saw of that $5?
A. I presume so.
Q. He didn't give it back to you?
A. No, sir. 156

CROSS-EXAMINATION BY MR. SMITH:

Q. Did you give it willingly?
A. Yes, sir.
Q. What was that— a national bank note, or gold, or silver, or what?
A. I don't recollect; it was a five dollar bill.
Q. You don't recollect?
A. No, sir.

157 Q. Whether it was a national bank bill?
A. No, sir.
Q. Or a greenback?
A. No, sir.
Q. It was a bill of some kind?
A. It was a bill of some kind; yes, sir.
Q. You wont swear which?
A. No.

By Mr. Fiero: Q. Was it either a treasury note or a national bank note?

158 A. I presume it was a treasury note.
Q. That is your best recollection?
A. That is my best recollection.
Q. You don't know.
A. No, sir.

By Mr. Smith: Q. Have you any recollection at all which that was?

A. Well, the first payment I made was $5, of which the District Attorney has got the receipt; that was sent upon the 16th of October—the middle
159 of October. I got a receipt by mail. The second was directly after the first of November, our pay day, and I sent by Mr. Curtis to the Fifth Avenue Hotel, as I said in my first communication I would contribute at two payments $10.

By Mr. Fiero: Q. What is your best recollection as to what it was?

A. Well, it must have been treasury notes, because it was within two days after pay day.

Q. It was shortly after pay day?

160 A. Yes, sir.
Q. Was you paid in Treasury notes?
A. Yes, sir.

By Mr. Smith: Q. Have you any distinct recollection of your own knowledge whether it was a treasury note or a national bank note. Have you any recollection now?

A. Not further than it was money that I received two days before from the Sub-Treasury.

Q. That is all you know?
A. That is all I know.

Q. Do you know what you received—you don't recollect what you received, do you? 161

A. When we receive money from the treasury we generally get treasury notes.

Q. Generally?

A. Yes.

Q. It was not always so, was it?

A. Pretty much so; they never pay in anything else; I have never got anything else but treasury money.

Q. Do you have any recollection of this particular case? 162

A. Not of this particular case.

Q. You have no certain recollection what you paid to General Curtis, have you?

A. No, sir.

By Mr. Fiero: Q. How long was it after pay day?

A. Three days after pay day.

Q. And you say it was from that money?

A. From that money. 163

Q. And your best recollection is what?

A. That it was in treasury notes.

John V. Vanarsdale, a witness called on behalf of the plaintiff, being duly sworn, testifies as follows:

By Mr. Fiero: Q. What is your business?

A. Clerk in the New York Custom House.

Q. How long have you been a clerk there? 164

A. Seventeen or eighteen years.

Q. Have you produced certain papers from the records of the New York Custom House?

A. I have.

Q. Will you please see if you have the last appointment of Peter Vogelsang there, under which he was acting in October, 1881?

Witness produces book and hands to the District Attorney.

165 Q. Have you made an examination to see if there was anything later?

A. Yes, sir; that was the last.

The book, that portion relating to the appointment of Peter Vogelsang, is marked Exhibit 21, as follows:

"TREASURY DEPARTMENT,
WASHINGTON, D. C., March 2nd, 1875.

SIR—The following nominations, submitted in
166 accordance with the plan of reorganization, contained in department letter of January 23rd last, are hereby approved, to take effect from the 1st instant, except those of storekeepers, which will take effect from the 5th instant, viz.:

COLLECTOR'S OFFICE.

No.	Name.	Designation.	Compensation.
7.	Peter Vogelsang.	Messenger.	$1,000 per annum.

The offices of Captain and Lieutenant of Night Inspectors are hereby abolished, and in lieu thereof the appointment of three Inspectors, at a compensation of $4 per diem each, is authorized. All
167 other Customs employees of your office not herein included, except Special Inspector Henry A. Jackson, are discontinued from the 1st instant.

I am,
Very respectfully,
B. H. BRISTOW,
Secretary."

"MR. C. A. ARTHUR,
Collector, &c.,
N. Y. City."

(The letter contains a long list of other appoint-
168 ments.)

Q. See if you have the same in reference to the appointment of William A. Jones, as Deputy Collector?

A. Here is one of February, 1878.

Q. Of whom?

A. Of Peter Vogelsang.

Q. There was one of February, 1878?

A. Yes, sir.

Q. What was that?

(Witness produces paper and hands to the District 169
Attorney.)

Q. This one of February 3rd, 1878, is the same thing, except that it is by the Secretary of the Treasury?

A. John Sherman.

(Letter marked Exhibit 22, as follows):

"TREASURY DEPARTMENT,
February 2nd, 1878.

GENERAL C. A. ARTHUR, 170
Collector of Customs,
New York City.

SIR—The following nominations of persons heretofore employed, submitted in your letter of the 23d instant, to fill the positions created by Department letter of January 25th, 1878, effecting a re-classification of the force of your office, are hereby approved, to take effect on the 1st instant.

"COLLECTORS' OFFICE.

No. 3, Peter Vogelsang, Messenger, $840 per. annum."

Among many other names also appears that of 171

"FIFTH DIVISION.

No. 36, Isaac Trimble, opener and packer seizure room, $1,095," * * * * * "I have approved the recommendations contained in your letter of the 23d and 25th instant, relative to the compensation of W. N. Howell, clerk, No. 40, 5th division; C. B. Fowler, Clerk, No. 37, 1st Division, and George F. Booth, Clerk, No. 48, 5th Division.

I am,
Very Respectfully,
JOHN SHERMAN, 172
Secretary."

Q. Have you the one in reference to the appointment of Charles Treichel?

A. Yes, sir [produces the same and hands it to the District Attorney].

Q. That is the last one?

A. That is the last one—that is not the last; he was appointed Auditor on February 13, 1882 [produces another paper marked Exhibit 24, as follows]:

173 "TREASURY DEPARTMENT,
Washington, D, C., April 1st, 1879.

General E. A. MERRITT,
Collector of Customs,
New York City.

SIR—The following nominations, submitted in your letter of this date, are hereby approved, the appointments to take effect from the date of oaths. Henry W. Belcher, Auditor, at a compensation of five thousand ($5,000) dollars per annum, vice Charles Treichel, transferred. Charles
174 Treichel to be Assistant Auditor, at a compensation of thirty-five hundred ($3,500) dollars per annum, vice John A. Herrick, transferred. The office of Chief Disbursing Clerk, No. 2, at a compensation of three thousand ($3,000) dollars per annum, heretofore held by H. W. Belcher, is hereby abolished.

I am, very respectfully,
JOHN SHERMAN,
Secretary."

175 Q. Have you the oath of Mr. Treichel?
A. No; I have not.

MR. FIERO: I ask the privilege of putting in the oath of John Treichel.

MR. SMITH: I ask the privilege of waiting, before I say anything until he puts in all his testimony.

THE COURT: I will allow you to supply that proof at any time.

[The witness states that he will send the
176 oath of John Treichel].

Q. There was one in which he was made Auditor?
A. Yes.
Q. But that was in 1882?
A. Yes, sir.

CHARLES W. BEEBE recalled for cross-examination at the request of defendants' counsel.

CROSS-EXAMINED BY MR. CLARKE:

Q. You spoke of General Curtis making deposits in the bank with which you are connected?
A. Yes, sir.

Q. Those deposits were made to the credit of the 177
Republican State Committee?

A. Yes, sir.

Q. Please state on whose checks, and whose checks alone, the money deposited in that account could be drawn?

A. Well, they had to be countersigned by B. Platt Carpenter and Mr. N. M. Curtis.

Q. B. Platt Carpenter, the Chairman of the Committee?

A. And N. M. Curtis. 178

Q. General Curtis' individual check, or his check as treasurer, wouldn't have drawn the money?

A. No, sir.

BY MR. FIERO. Q. The checks had to have both signatures?

A. Yes, sir.

Mr. Fiero states that with the exception of the oath of John Treichel, the case for the Government is closed. 179

Mr. Smith states that the defendant has no testimony to offer.

Testimony closed on both sides, with the exception above mentioned.

MR. SMITH: On what counts, Mr. District Attorney, do you claim a verdict?

MR. FIERO: The first, fourth, eighth, and ninth.

MR. SMITH: And no others?

MR. FIERO: No, under the ruling of the 180
Court.

Court adjourned for the day.

The Court met pursuant to adjournment.

PETER VOGELSANG, a witness on behalf of the plaintiffs, being recalled, further testified as follows:

This witness was recalled at the suggestion

181 of the Court, for further examination as to the money which he testified to having paid to the defendant, that there might be no doubt as to the meaning of his former testimony.

By Mr. FIERO: Q. Could you tell, if you saw one, the character of the note you gave General Curtis?

A. To the best of my recollection I could; yes, sir.

Q. Could you tell?

182 A. I think I could.

Q. (Handing witness a $5 greenback.) Please look at this and see if that is similar to it?

A. That is similar to the money that we were usually paid in.

Q. That is the kind of note you gave him?

A. Yes, sir; I presume that was the kind of note I gave him.

RE-CROSS EXAMINATION BY Mr. SMITH:

183 Q. How do you distinguish a greenback from a national bank note?

A. Well, from its general appearance, and the way we have generally been paid in the treasury.

Q. Don't you know whether you have received silver certificates in payment?

A. I couldn't tell.

Q. Do you know what a silver certificate is?

A. Yes, sir.

Q. Haven't you been paid silver certificates?

184 A. No, sir.

Q. Do you mean to say that they don't pay them out in the Custom House?

A. I don't know that they pay them to the employees.

Q. You don't know?

A. No, sir.

Q. Do you mean to say that they don't pay out national bank notes to the Custom House employees?

A. I presume they may, but that is the character 185
of the money that we generally received.

Q. Have you talked with the District Attorney about the matter before you came on to the stand?

A. Not particularly.

Q. I didn't ask you whether particulrly or otherwise. Have you talked to the District Attorney about the character of the money you were paid before you were called as a witness?

A. Well, yes sir, I did.

Q. And then was your recollection refreshed by 186
the District Attorney asking you if you were paid greenbacks?

A. He asked me if I saw the note if I could tell the difference between the note I was paid and any other note.

Q. When did he ask you that?

A. That was this morning.

Q. But before you were called the other day hadn't he asked you about the character of the money that you were paid? 187

A. No, sir.

Q. Don't they pay gold and silver at the Custom House to employees?

A. Yes sir, they do.

Q. Do you swear that at that payment before you met General Curtis you didn't receive any gold or silver?

A. Well, I didn't give it to General Curtis.

Q. That is not my question. Will you swear that you didn't receive any gold or silver? 188

A. Well, I couldn't swear to that, but on that particular occasion I dont think I did.

Q. When was the payment two days before?

A. On the 30th of October.

Q. Then you were paid on the 13th of the month, were you?

A. The 30th, the last day of the month.

Q. And that was two days before you handed it to him?

A. About three days, yes sir.

189 Q. What did you receive at the very last payment that you have had at the Custom House?

A. The last payment I think I received the same character; no I didn't; the last payment I didn't receive all in greenbacks, because I remember now that some was other denominations.

Q. What else?

A. National bank—now I recognize.

Q. Then they do pay national bank notes at the Custom House?

190 A. Yes they do.

Q. Do you mean to say that they didn't pay national bank notes then?

A. Yes, I can't say for that.

Q. Do you know what kind of money you have in your pocket now? Have you got any?

A. No, sir.

Q. Have you any?

A. No, sir.

Q. No money in your pocket?

191 A. No, sir.

Q. [Showing witness a national bank bill.] What do you call that?

A. That I am told is a national bank note.

Q. Are you willing to say that between the time that you were paid off and the time that you met General Curtis, you hadn't changed any of your money so as to get a national bank note into your possession?

A. Yes, sir.

192 Q. You will swear to that?

A. Yes, sir.

Q. You were not so positive yesterday?

A. No, but—

Q. You are sure it was not a national bank note?

A. Yes, sir.

Q. You were not sure yesterday, however?

A. I mean now.

Q. What was the amount of the payment of your salary to you?

A. At that time it was $50.

Q. Do you know how that was paid to you, as to 193
denomination?

A. No, sir; it was so long ago I can't tell.

Q. You don't remember whether you received one fifty dollar bill, or five tens, or ten fives?

A. I am confident I did not receive any fifty dollar bill.

Q. But you don't recollect anything beyond that?

A. Well, I might have received a ten dollar bill.

Q. But you don't recollect? 194

A. Not positively; I couldn't swear to it.

Q. Do you know how you were paid at the very last payment as to denomination?

A. No, sir.

It is agreed that the $5 greenback shown to the witness by Mr. Fiero need not be marked as an exhibit.

Mr. Fiero offers in evidence the oath of the witness Charles Treichel, marked Exhibit 25, 195
as follows:

"OATH OF OFFICE.

"I, Charles Treichel, having been appointed Assistant Auditor in the office of the Collector of "Customs in and for the Port and District of New "York, do solemnly swear that I will diligently "and faithfully execute the duties of the said office, "and that I will use the best of my endeavors to "prevent and detect frauds against the laws of the "United States imposing duties upon imports.

"I do further solemnly swear that I have never 196
"voluntarily borne arms against the United States "since I have been a citizen thereof; that I have "voluntarily given no aid, countenance, courage or "encouragement to persons engaged in armed hostility thereto; that I have neither sought, nor accepted, nor attempted to exercise the functions of "any office whatever, under any authority or pretended authority, in hostility to the United States; "that I have not yielded a voluntary support to any "pretended government, authority, power or constitution within the United States, hostile or inimical thereto.

"And I do further swear that, to the best of my

197 " knowledge and ability, I will support and defend
" the Constitution of the United States against all
" enemies foreign and domestic; that I will bear
" true faith and allegiance to the same; that I take
" this obligation freely, without any mental reser-
" vation or purpose of evasion; and that I will well
" and faithfully discharge the duties of the office
" on which I am about to enter.
" So help me God.

" CHARLES TREICHEL.

" Sworn and subscribed be-
" fore me, this 2d day of
198 " April, A. D. 1879.

" I. D. BALCH,
" Spl. Dep. Collector."

Several witnesses testified that the defendant's place of business was in the same U. S. Government building with Vogelsang and Treichel; that he knew them and their occupations, and that Vogelsang paid the money in the Collector's office, where he was employed, to the defendant. Also it was shown that the Circular Exhibit 4 was received by
199 others, and that one Isaac Trimble, employed in the Custom House, paid the defendant ten dollars, and defendant told him he (defendant) would see that he (Trimble) had a receipt. Subsequently Trimble received by mail the receipt, Exhibit 7.

Exhibit 7.

" REPUBLICAN STATE COMMITTEE,
FIFTH AVENUE HOTEL,
NEW YORK, November 4th, 1881.

DEAR SIR:

200 I have received your favor of ——— enclosing $10, contributed to the treasury of the Republican State Committee.

Very respectfully,
N. M. CURTIS,
Treasurer.

To ISAAC TRIMBLE,
Custom House, N. Y. City."

This Exhibit 7 is in the handwriting of one Johnson (*a witness*), clerk of the Republican State Committee.

The defendant then moved that a verdict of not guilty be directed on each of the counts.

THE COURT: For the purpose of this trial, upon 201
the motion made by the counsel for the defendant, I shall rule that there is evidence sufficient to sustain a finding the averment of the indictment, that the defendant was an employe, within the meaning of the statute. I am also of the opinion that the receipt of money by the defendant for the purpose of the Republican State Committee, under the circumstances, is within the prohibition of the statute, notwithstanding the fact that the defendant was acting as a member of that committee and the 202
treasurer.

On the fourth count my opinion is that there can be no conviction.

In regard to the eighth count I am of the opinion that the variance is not fatal and that the payment of the check by Treichel to the defendant was a payment of a thing of value within the meaning of the statute.

On the ninth count I am of the opinion there must be a verdict of not guilty. 203

MR. SMITH: I understand your Honor to rule not only that General Curtis was an employe, but that the others were also employes.

THE COURT: I am under the impression that they are employes.

MR. SMITH: Your Honor will note our exception.

Exception noted.

MR. SMITH: I ask a separate exception in the case of the first and eighth counts, to the refusal of your 204
Honor to direct a verdict for the defendant.

Exception noted.

Whereupon the Court charged the jury as follows:

JUDGE'S CHARGE.

The statute under which the defendant is indicted declares as follows: All executive officers or employes of the United States not appointed by the President, with the advice and consent of the Senate, are prohibited from requesting, giving to, or re-

205 ceiving from, any other officer or employe of the Government, any money or property, or other thing of value, for political purposes.

Under this statute this defendant has been charged by the Grand Jury with various offenses. The indictment contains eleven counts, and each of these counts is a separate and distinct charge, relating to a separate and distinct transaction. As to many of those counts no evidence has been adduced. As to others the rulings of the Court have been such as to
206 leave nothing for your consideration. Those are the second, third, fourth, fifth, sixth, seventh, ninth, tenth and eleventh counts of this indictment. On those counts, therefore, the defendant is entitled to a verdict of not guilty at your hands, on each of them. The first and eighth counts of the indictment are, however, to be submitted to you.

These two counts to which I call your particular attention, as I have stated, charge two separate transactions.

207 The first count charges that the defendant, being an employe of the United States, received from Peter Vogelsang the sum of five dollars in money for political purposes, Vogelsang being at the time, as the defendant well knew, also an employe of the United States.

There are five ingredients in this offense. The defendant must be an employe of the United States, not appointed by the President with the advice and consent of the Senate. The papers in evidence,
208 and which are not controverted, show him to have held a position under the United States Government, which in my opinion makes him an employe of the United States, within the meaning of this statute. You will have no difficulty upon that question.

Did the defendant receive five dollars from Peter Vogelsang, as charged? The averment is specific, that he received at a certain time and place a certain sum of money. Money in this amount means lawful money. This averment is supported by

testimony that he received from Vogelsang five 209
dollars in United States notes, commonly called greenbacks. You have heard the testimony upon that, the statement of the man Vogelsang, and will come to a conclusion as to how the fact was. Vogelsang says he paid five dollars, and he is not contradicted in what he says about the kind of money which he paid.

The defendant is shown to have been a member and the Treasurer of the Republican State Committee. If Vogelsang paid the defendant this 210
money, this was receiving the money by him within the meaning of the statute, although the defendant received the money as Treasurer and for the committee.

It is no defense to say that he received the money as Treasurer for the committee. The prohibition of the statute is against the receipt of such money by him in any capacity.

The next question is, was the money received for political purposes? The circumstances under which 211
the money was received, and the purpose for which it was intended, are not really open to serious dispute; and I charge you that an assessment levied by the Republican State Committee, in October last, for the purpose of defraying the expenses of that committee in the political campaign then pending, and received by the defendant for the purpose of so applying it, was received for political purposes within the meaning of the statute; and this, notwithstanding it may have been the defendant's intention 212
to place the money with the other funds collected by the committee for that purpose, and the fact being that he actually so placed it.

The next question is, was Peter Vogelsang, at the time of the payment of this money, an employe of the United States? The evidence shows that he was a messenger in the Custom House. If he was employed, as the papers before you indicate, then he was an employee of the United States within the meaning of this statute and the prohibition thereof.

213 Lastly, did the defendant, when he received the money from Vogelsang, know that Vogelsang was an employee of the United States? For the purposes of this trial, I charge that such knowledge on his part must be found by the jury. Knowledge of such a fact as this can be proved by circumstances. It is not to be expected that the Government will prove that the defendant saw Vogelsang's appointment, or heard Vogelsang say, at any time, what his employment was. But the jury may infer from
214 circumstances, that the defendant must have known that Vogelsang was an employee of the United States.

The place, the acquaintance, what transpired between them, all the surrounding circumstances are to be resorted to, to enable the jury to determine whether the defendant knew, at the time when he took this money from Vogelsang, that Vogelsang was an employee of the United States.

215 The eighth count differs from the first one, simply in this, that it charges a receipt of a certain check from another person, Charles Treichel. There is evidence to show that Treichel was, what is sometimes called, Assistant Auditor, and I charge you that if Treichel was holding the position which the papers in evidence show, then he was an employee of the United States within the meaning of the statute.

This count charges the receipt of a check for one
216 hundred dollars as an article of value, and I charge you that under the evidence you are justiified in finding that he did receive an article of value from Treichel for political purposes, if you find that the check was paid for the purposes I have described to you in considering the first count.

Under the eighth count and under the first count, the same ingredients are to be found by the jury; the defendant's employment; the receipt of money from Vogelsang under the first count, and the receipt of a check from Treichel, under the eighth

count; that the receipt was for political purposes 217
and knowledge of the employment of the person from whom the money was received.

Upon each of these counts and each of these points you must be satisfied beyond a reasonable doubt. The burden is upon the Government to prove each charge as laid. The evidence which has been adduced is of so convincing a character upon these respective points that if this were a civil case, I should direct a verdict. But the power of the Court to direct a jury to find a verdict is never ex- 218
ercised in a criminal case adversely to the prisoner, and therefore I give you no such direction in this case. I leave it to you. I state my opinion only for your aid and assistance, but not as controlling or as a direction. You must form your own opinion, for upon you and not upon the Court is cast the duty of saying whether the defendant is guilty or not guilty of the charges in these two counts of this indictment.

With that duty, gentlemen, comes also attendant 219
responsibility—no light responsibility. The responsibility upon a Judge and upon a jury in a criminal case is never light, for the welfare of the community is largely affected by the administration of the criminal laws, and the Republic suffers detriment whenever convincing proof of the commission of crime is not followed by the verdict which such proofs demand. That responsibility now rests upon you, and upon each of you. I do not assume it for you. I leave you to render your verdict in the case 220
as you find the facts proven. I warn you to dismiss all prejudice from your minds, if any there exists, either for or against this defendant. I warn you to dismiss any political considerations as affecting one or the other of the two great political parties that divide the country.

You are the consider this case upon its own merits and according to its own facts, as those facts have been proved, upon the two issues which I have presented for your consideration. Take the case, gen-

221 tlemen, and see to it that your verdict is such that you can go before your fellow-citizens and say, each for himself: "It is a true verdict, according to the evidence."

The defendant's counsel then asked the Court to instruct the jury that, "if they find the check which Charles Treichel delivered to the defendant was not payable 'to the order of Newton Martin Curtis,' but was payable 'to the order of N. M. Cur-
222 tis, Treasurer of the Republican State Committee,' their verdict will be for the defendant." The Court declined to give this instruction, to which refusal the defendant took an exception, which was allowed.

To all but the first sentence of the following passage, in the judge's charge, the defendant excepted: "The defendant must be an employee of the United States, not appointed by the President with the advice and consent of the Senate. The papers in evi-
223 dence, and which are not controverted, show him to have held a position under the United States Government, which, in my opinion, makes him an employee of the United States within the meaning of that statute. You will, therefore, have no difficulty upon that question."

The defendant also excepted to so much of the next succeeding passage of the charge as states, in reference to the allegation of the first count, charging the reception of five dollars from Peter Vogel-
224 sang, that "This averment is supported by testimony that he (Curtis) received from Vogelsang five dollars in United States notes, commonly called greenbacks. You have heard the testimony upon that, the statement of the man, Vogelsang, and will come to a conclusion how the fact was. Vogelsang says he paid five dollars; and he is not contradicted in what he says about the kind of money which he

paid. The defendant is shown to have been a 225
member and the Treasurer of the Republican State Committee. If Vogelsang paid the defendant this money this was receiving the money by him, within the meaning of the statute, although the defendant received the money as treasurer and for the committee. It is no defence to say that he received the money as treasurer for the committee. The prohibition of the statute is against the receipt of such money by him, in any capacity."

The defendant also excepted to all after the first 226
sentence of this quoted passage of the charge, relating to the relation borne by Vogelsang to the United States, viz.: "The evidence shows that he was a messenger in the Custom House. If he was employed as the papers before you indicate, then he was an employee of the United States within the meaning of this statute, and the prohibition thereof."

The defendant also excepted to this language of the charge, referring to the eighth count: "I charge 227
you that if Treichel was holding the position which the papers in evidence show, then he was an employee of the United States, within the meaning of this statute."

The defendant also excepted to the following passage of the charge, though given in the connection with the other language indicated in the before-printed full charge, viz.: "The evidence which has been adduced is of so convincing a character upon these respective points, that, if this were a 228
civil case, I should direct a verdict; but the power of the Court is never exercised in a criminal case adversely to the prisoner, and therefore I give you no such direction in this case."

At the close of the charge the defendant requested the Court to instruct the jury that the statute upon which this indictment is based is unconstitutional.

229 This request was denied and the defendant excepted.

The jury thereupon retired in charge of an officer duly sworn for that purpose, and subsequently returned a verdict, whereby they found the defendant guilty upon the first and eighth counts of the indictment, and not guilty upon the other counts.

The defendant's counsel thereupon requested a stay of all further proceedings and of sentence, so that the defendant might make a motion for a new
230 trial, and in arrest of judgment, which was duly granted, and the defendant in due time filed a notice of such motion, and seasonably served the same upon the United States Attorney for this district, of which notice the following is a copy:

UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT.

231

THE UNITED STATES

AGAINST

NEWTON MARTIN CURTIS.

Notice of motion for new trial and in arrest of judgment.

Take notice that, on the exceptions taken at the trial and upon the pleadings and proceedings
232 herein, the defendant will move this Court at the next Ciminal term thereof, to be held at the United States Court rooms, in the United States Court and Post Office building, in the City of New York, in said Southern District of New York, before the Circuit Judge and the two District Judges thereof, on the third Thursday of June, A. D. 1882, at eleven o'clock in the forenoon of that day, for a new trial and in arrest of judg-

ment herein, and for such other and further relief 233
as may be just and right in the premises.

New York, May 26, 1882.

EDWIN B. SMITH,
Attorney for Newton Martin Curtis, Defendant.

To HON. S. L. WOODFORD, United States Attorney
for the Southern District of New York.

The foregoing settled by me as the minutes of the
trial of this cause, this 14th day of June, 1882. 234

CHARLES S. BENEDICT.

235

236

Oct 9 1882

Supreme Court of the United States.

OCTOBER TERM, 1882.

EX PARTE: IN THE MATTER OF NEWTON M. CURTIS, PETITIONER. } No. Original.

PETITION FOR WRIT OF HABEAS CORPUS.

BRIEF FOR THE PETITIONER.

EDWIN B. SMITH,
Of Counsel.

STANLEY, CLARKE & SMITH,
Attorneys for Petitioner,
160 BROADWAY.

SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1882.

No. ORIGINAL

Ex parte, NEWTON M. CURTIS, *petitioner for habeas corpus.*

BRIEF FOR THE PETITIONER.

STATEMENT.

The petitioner stands convicted upon the first and eighth counts of an indictment found against him in the Circuit Court of the United States for the Southern District of New York. They are to be found upon pages 2 to 4 of Exhibit A, annexed to the petition. He was sentenced to pay a fine of $500 upon each count. For non-compliance with this sentence, he is deprived of his liberty.

This indictment was found under the Act of Aug. 15, 1876, c. 287,

"Sec. 6. That ALL *executive officers or employees* of the United States, not appointed by the President, with the advice and consent of the Senate, are prohibited from [1.] *requesting*, [2.] *giving to*, or [3.]

receiving from, ANY other officer or employee of the Government *any money, or property, or other thing of value*, for political purposes;—

And any *such* officer OR employee who shall offend against the provisions of this section shall be at once *discharged* from the service of the United States;—

And he shall *also* be deemed guilty of a misdemeanor and, on conviction thereof, shall be fined in a sum not exceeding five hundred dollars." 19 Stats., 169.

Richardson's Sup. to U. S. R. S., 245.

The indictment against the defendant contained eleven counts. Upon the first and eighth he was convicted, and acquitted upon the others. The first count charged him with "receiving" five dollars "in money" from Peter Vogelsang, in October, 1881, "for political purposes," to wit, for the use of the Republican State Committee, of which Curtis is alleged to have been a member, in the then pending campaign, both Vogelsang and Curtis being (as it is alleged) then "employees" of the United States, not appointed by the President with the advice and and consent of the Senate (Ex. A., pp. 2 and 3).

The eighth count charges the like reception by Curtis, from Charles Treichel, of a certain "thing of value," to wit, the bank check of Mr. Treichel for one hundred dollars, "payable to the order of him, the said Newton Martin Curtis," for the use aforesaid. There is the same allegation, that each of these persons were then such "employees" of the United States, it being stated that Mr. Treichel was an "auditor" at the Custom-House (Ex. A., pp. 3 and 4).

The indictment charges that Gen. Curtis is liable to the penalty of the before-cited statute because, at the time of the reception of this money and check, he was employed as an expert in government causes pending in the federal courts, which is as-

sumed to bring him within its terms. The nature and derivation of his employment must be determined from the letter of the Secretary of the Treasury, dated January 13, 1880, found upon page 6 of Ex. A., which is the sole evidence of any relation borne by Gen. Curtis to the United States.

Peter Vogelsang's appointment will be found at the middle of page 43 of Ex. A., and that of Charles Treichel, as Assistant Auditor, at the top of page 44 of the same exhibit. The latter's oath is on pages 49 and 50.

The judgment and sentence of the Court below are null and void, because the proceedings therein were *coram non judice.*

The Circuit Court had no jurisdiction;—neither of the cause, nor of the person, because

1st. The act of August 15, 1876, c. 287, sec. 6, is unconstitutional.

2nd. Gen. Curtis, the respondent, was neither an executive officer nor employee of the United States.

3d. Neither Peter Vogelsang nor Charles Treichel was an employee of the United States, within the meaning of that statute.

BRIEF.

The paramount question of the *constitutionality* of this statute will be first considered.

I.

To correct misapprehension of the purport of the law, and that we may better understand what this is, let us examine its phraseology, and see what it is *not*.

It is *not* a statute to prevent the levy of political assessments.

This act denounces its penalty against the doing, by certain minor officers or employees, of either of three things, viz.:—(1) requesting, (2) giving, or (3) receiving money, or value, from any one in Government service, for a political purpose.

Only with the last (receiving) does Gen. Curtis stand charged.

It is a law, then, against VOLUNTARY CONTRIBUTIONS for political purposes:—and it is *nothing else*. It is a statute *de donis*.

It forbids subordinates to unite for the promotion of objects they approve: it does not prevent their superiors from using coercion to compel contributions for purposes the contributors may entirely disapprove.

The Constitution contains no clause, and no grant of power, upon which such a law, passed for such a purpose, can rest.

Certainly, the authority for it is nowhere *expressly* given; nor does careful scrutiny reveal to us anything from which it can be derived, even by the most strained inference.

A comparison of the Federal with the State Con-

stitutions, shows that, while the State Legislatures are invested with very general legislative powers;—to do *anything* which the Constitutions (and natural justice) do not forbid;—Congress is delegated with very limited legislative authority;—to do *nothing* which the Constitution does not first sanction.

Calder v. Bull, 3 Dallas, 387.

People v. Draper, 25 Barb., 359.

Mason v. Waite, 4 Scam., Ill., 134.

By reason of these limitations, it might be argued that the legal presumption is the same as to Congress that it is as to the federal courts, viz.: that a cause is presumed to be *without* its jurisdiction until shown to be within it. Turner v. Bank, 4 Dallas, 11; State v. Sanford, 1 N. & McC., 512. But it is hardly worth while to discuss this matter of legal presumption, since the sole question is whether a written instrument, all of the terms of which are open to scrutiny, confers the requisite authority.

The *preamble* does not contain any delegation of power. However much an Act might facilitate the administration of justice, insure domestic tranquility, aid in the public defence, or promote the general welfare, it would not be constitutional to enact it unless authority for it were found in some subsequent provision of the Constitution. Congress can not do just what it thinks will—or even whatever manifestly does—have a tendency to advance these great designs which led to the formation of the Federal Constitution.

It was 'in order' to attain the great objects mentioned in the preamble that "*the* legislative powers *herein granted*"—and none other—were vested in a Congress of the United States; and these to accomplish *national* purposes only. U. S. v. Cruikshank, 92 U. S., 549, 550.

If these powers be inadequate, the end, however desirable, cannot be accomplished by congressional intervention.

Article 1, section four, of the Constitution contains the first grant of legislative authority.

It allows, to a limited extent, a revisory control over, and amendment of, the regulations made by the States with reference to the election of senators and representatives in Congress. Authority over *elections* is circumscribed within the limitations of this section. *There is none given over preliminary "campaigns."* Giving this much control over elections expressly, negatives the idea that any further power to affect them can be derived by implication. Every other measure, outside these narrow bounds, to preserve the purity, or give effect to the results, of elections must emanate from State legislation.

The three succeeding sections (5, 6, and 7) relate merely to the forms of procedure in Congress, the methods of organization, the compensation and privileges of its members.

The eighth section contains, practically, an enumeration of *all* the general, independent powers of legislation conferred upon Congress. 25 Barb., 359, cited *ante*. Of no one of them can it be affirmed, that it furnishes manifest authority for this legislation.

Disregarding (as not affecting the case in hand) the provision as to exclusive legislation over particular *places*, it will be perceived that each grant of legislative power in section 8 is based upon some *subject-matter* of appropriate federal cognizance, and *not* upon the existence of any relation of individuals to the Government;—with the single exception of those enrolled in the land or naval forces.

The exception proves the rule. The reason for the distinction is plain; and where the reason does not apply, the exception is not made.

Manifestly, this statute does not pertain to either of the special subjects enumerated in the several clauses of section eight, first article of the Constitution. It does not expedite the transit, nor facilitate the delivery, of the mails; protect the coin or cur-

rency of the United States, nor (in short) promote any of the specified objects of national legislation.

It was suggested in argument below that the power to pass this law is fairly deducible from that "to lay and collect taxes."

How, any more than from that to establish post-offices and post-roads, or any other of the seventeen grants, was not stated, nor can we conjecture.

Nor can such authority be deduced from the general idea of national sovereignty, unless it is first shown that the United States *is* sovereign over *the thing* to which the enactment relates.

This deduction was made by the Court below from the premise that, "undoubtedly it is lawful for Congress to prescribe all needful regulations for the discipline of government officials, and to declare what infractions of discipline shall be treated as criminal offenses."

It may be questioned whether this premise is so indubitable as it is assumed to be. The query may be suggested, whether it is not an unwarranted invasion of the power of the Executive, for Congress to dictate for what causes—especially for what causes not criminal—removals from office shall be made; whether, for Congress to prescribe the *discipline* of the departments is not an unwarrantable extension of the legislative function.

The Court below proceed to say that, as there resides in the legislative department "the power to prohibit acts of officers or employees which are incompatible with the proper discharge of their duties or which impair the [their?] efficiency, or tend to demoralize the public service, * * * in executing this power Congress must of necessity exercise its judgment and discretion in determining what acts are or are not of such a pernicious character and tendency;" and "it is only when Congress has palpably transgressed the limits of its discretion that

the judicial department will intervene. Such a case might arise if Congress should attempt to prohibit an act of a nature pertaining so exclusively to the sphere of private conduct that it could not, by *any* implication, impinge upon official deportment or official discipline." (12 Fed. Rep., 839).

The defendant, on the contrary, contends that, to justify the making the commission of any act penal, such act *must* necessarily affect the public *service*, and not merely the public *servant*, even although coupled with an inferentially possible diminution of his capacity or inclination to serve efficiently. The United States can regulate *only* "acts of a nature pertaining so exclusively to the sphere of *official* conduct that they *must* necessarily" impinge upon official deportment or official discipline. All else is entirely within the police power of the States.

Though the Court below laid some stress upon the fact, we deem it quite immaterial that *both* parties to the prohibited act are to be officers or employees of the United States. If mere employment is a ground of federal criminal jurisdiction, it is enough that *one* is so employed. If employment is *not* a jurisdictional fact, it is of no consequence that *both* are officers or employees.

The right to establish disciplinary regulations, prescribing the character of dealings permitted between officials, necessarily implies the right to say what transactions an officer may have with a private citizen; since it must be the tendency of the act, with regard to the public service, and not the mere official position of the actors that affords the basis for legislation. The donations prohibited by this statute are no more prejudicial to the public service than if given to a Congressional or State committee, composed of non-officeholders. True, instances might be supposed of superiors so 'requesting' contributions from subordinates as to be tantamount to a demand (this statute imposing no restraint upon the superior); but it is not against extortion, or such an abuse of official power, that

this statute is directed. It only limits inferior officers in requesting, receiving or giving for political purposes. Upon this, the Court below properly observe: "No person can be indicted under it for any other act than the one precisely designated. Whatever may have been the attendant circumstances, and however they may have qualified the moral complexion of the transaction, the person indicted can only be tried for doing the thing which the statute prohibits; and unless this *of itself*, isolated from all its concomitants, can be competently made a crime by Congress, the statute is nugatory." 12 Fed. Rep., 838.

In the sentences just preceding those above quoted, the Court had said: "We cannot profess to be ignorant that this law was enacted in order to interdict practices which have become a topic of extended animadversion. But, although it may have been aimed at the suppression of the practice which has prevailed among party organizations of soliciting contributions for party purposes from their office-holding members, or exacting them by moral coercion; and although its provisions may be well calculated to effect *this* object; it does not follow that it can be sustained as a legitimate means to that end." *Ibid.*

That is to say; after declaring, or strongly intimating, that the statute is not a legitimate means to accomplish the end avowedly sought in its enactment (that end not being one of the proper objects of Federal legislation), the Court do sustain it as a disciplinary measure. They say, Congress can prescribe rules of discipline, and determine what acts are incompatible with the proper discharge of official duty; therefore the Court must assume such was the ground of Congressional action, although just before saying it was impossible to ignore the fact that the law was passed for a very different purpose—not within the sphere of national legislation.

If sustainable as a rule of *official* conduct, then

Congress may regulate the whole life of an office-holder, and every transaction with a fellow-citizen.

The proposition that any act whatsoever of one in the civil employ of the United States may be made criminal, and the whole course of his life be regulated by Congress, merely as an incident to the fact of employment, seems hardly worthy of serious refutation; yet careful examination of the Statute, and the treatment it has received from others, and the opinion of the Court below, indicate no other ground to be taken in its support.

It cannot be, that Congress can declare that post-masters shall be married with special solemnities, or divorced only for specified causes; that the notes of pension-agents shall bear two days' grace, or four, or be payable without grace; that adultery by a customs-officer, whether with another "officer or employee of the government" or not, shall be a capital offense, wherever committed; etc., etc.

Yet if Congress can, because of this employment, make criminal *any* act of a federal employee, *outside the discharge of official duty*, it may do so as to *every* act of his life. Either the nature of the relation, and the duties it imposes, must define and circumscribe the power of regulation and dictation by the superior, or else it is without limitation.

The *subject-matter* sets the bounds, which Congress may not pass.

No act, committed within a State, can be made an offense against the United States, "*unless it have some relation to the execution of a power of Congress*, or to some *matter* within the jurisdiction of the United States."

U. S. v. Fox, 95 U. S., 672.

Tennessee v. Davis, 100 U. S , 260–1.

In one of the briefs filed for the prosecution in the Circuit Court this last-mentioned case is cited, as showing how officers are protected *in the discharge of their duty.*

Yes, Davis was authorized to remove his case only and solely *because* the act of which he was ac-

cused was done in discharge of an official duty owed to the United States. He could not have removed it simply because he was a marshal *when* he did the thing for which he was indicted; but because he acted as marshal *in* doing it.

Gen. Curtis is not charged with "*receiving*" this money in the course of, nor in violation of, official duty; nor in his capacity of "expert in pending suits." The evidence would not support such charge. The indictment correctly states the reverse to be true; that he received it as a member of the Republican State Committee (of which he was Treasurer), for the use of that Committee, in the then-pending campaign.

So, too, the *payment* was not made, and is not alleged to have been made, by anybody in the course or violation of official duty; nor *because* of employment in the Government service. Each man paid as a member of "the party known as the Republican party," interested in its success.

True, the statute does not require, to incur its penalty, that the money should be paid or received in connection with the discharge of official duty; and it is precisely *because* the transaction has no relation to official duty, that it is something with which the Federal Government has, properly, nothing to do.

Not having any "relation to the execution of a power of Congress," nor to any "matter within the jurisdiction of the United States" (95 U. S., 672), Congress has no right to command in respect to it, and ought not to be obeyed. Its usurpations ought to be resisted. In no other way, can the just limitations upon its authority be established.

"Ubi non est condendi auctoritas, ibi non est parendi necessitas."

If "law, in its true sense, is" (as said by Judge Sharswood—Prof. Ethics, 11) "the work of the mere will; not an act of intellectual caprice, but a severe and necessary deduction from the relation of

things," a federal statute must be a necessary and proper deduction from the relation of things to the general Government; and where its effect is to affix penalties to a theretofore entirely innocent or laudable act, the deduction must be severely drawn, the necessity strict.

"The propriety of a law, in a constitutional light, must always be determined by *the nature of the powers upon which it is founded*. Suppose, by some forced construction (which, indeed, cannot easily be imagined) the Federal Legislature should attempt to vary the law of descent in any State; would it not be evident, that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State?" Federalist, No. 33, (Hamilton.)

Hitherto, *the tendency of the act*, with relation to duties imposed and powers conferred upon the Nation by the Constitution, has been the test of *criminality*. *Anybody* who interfered with its functions, whether personally connected with their proper discharge or not, is amenable to federal authority, civilly and criminally; because he is a trespasser upon the domain set apart to the United States, and meddling with *subjects* confided to the safe-keeping of the Union.

An examination of the statutes, from the Crimes' Act of April 30, 1790 (1 Stats., 112–119), down, justifies me in emphasizing the assertion that this act of Aug. 15, 1876, c. 287, § 6, is *the sole instance* in the entire legislation of the country of basing a conviction of crime upon the mere fact of the relation of the offender or the party injured to the United States, without regard to the direct effect of that act upon any *subject-matter* specially entrusted to the guardianship of the United States.

See 1 Abbott's U. S. Court Practice, c. v; Tit., "Crimes;" pp. 406-461.

In every other instance, the purpose has been to guard and promote the interests of the United

States. If, incidentally, the functionary (mail-carrier for instance) is protected *in the discharge of his duty* it is simply *in order that he may discharge the duty devolved upon him;* not that the individual be exempted from physical pain or mental annoyance.

Osborne v. U. S. Bank, 9 Wheaton, 865, bottom.
U. S. v. Harvey, 8 Law Rep., 77.
U. S. v. Parsons, 2 Blatchford, 104, 108.
U. S. v. Gay, 2 Gall., 359.
U. S. v. Hart, Peters' Cir. Ct., 390.
U. S. v. Kirby, 7 Wallace, 482.
U. S. v. Sander, 6 McLean, 598, 601.

Notice the language of McLean, J., at the page last cited.

The legislation assumed by the prosecution below to be of like character with that here in question is found in these sections of the Revised Statutes, viz.; 1358, 1546, 1688, 1784, 1789, 2078, 2158 to 2162, 3867, 4607, 5353, 5389, 5452, 5455, 5487 and 5498; of which it was then said; "Each of these statutes restricts the right of the individual to do what he pleases, or interferes with the disposition of his private property, in the same manner as the statute here under consideration. In each of these cases and in every similar case, such rights of the individual are properly restricted under the Constitution, *because the general welfare requires that such restriction shall be imposed.*"

This argument rests upon the untenable theory that, by virtue of the preamble to the Constitution, Congress can legislate at its discretion with regard to the rights of property and intercourse between citizen and citizen as it may imagine "the general welfare" of the country requires.

But, assuming (for the moment) that Congress has not, in any of the provisions found in either of the above-cited sections, transgressed constitutional limitations, an examination of them seriatim shows that no one of them affords a parallel or a precedent to the Act of Aug. 15, 1876, c. 287, sec. 6.

Sec. 1358 is found in the chapter relating to "military prisons;" part of the establishment as to which the constitution confers the *express* right to make rules;—but the section does not profess to dictate what use may be made of one's own property; it only says that those officially connected with the prison shall not be interested "in any contract, pur-" chase or sale made *on account of the prison;*" prescribing no penalty, however, for a violation of this prohibition. It is equivalent to saying that a trustee shall not acquire an interest adverse to his *cestui qui trust.*

Section 1546 forbids a superior to require or request a working man in any navy yard to contribute for political purposes, or to discharge a workingman for political opinion; and provides that any officer, &c., who does either of these things shall be dismissed from the service of the United States. This section has a basis similar to the one first quoted; but this, too, creates no *crime.* It states for what cause an officer or employee shall be dismissed from the service of the United States. It has always been freely conceded by us, that, except as it infringed upon the prerogative of the Executive, Congress has the power to dictate dismissal —or the head of a department may dismiss an employee—for any cause whatever, or for whatever seems to the chief to constitute cause for removal. Ex. p. Hennen, 13 Peters, 230.

Sec. 1688, merely directory, that diplomats (otherwise dressing as they please) shall not assume to give an *official* character to a costume not previously authorized by Congress. It regulates action *in* office.

Section 1784, originating in the act of Feb. 1, 1870, c. 11, is the last we shall separately examine, because it is the one mentioned in the opinion of the Court below as most nearly analogous to the act of Aug. 15, 1876, c. 287, sec. 6.

It forbids the making of presents by subordinates to their superiors, and the reception of such gifts by

the latter; but it does *not* make the doing of these things *criminal*; only directing those doing them to be dismissed from office.

Dismissal is not a *penalty*, within the legal meaning of that term; otherwise, it could not be inflicted without a trial and conviction: whereas it may be directed at pleasure; and incapacity arising from defective natural endowment, or from sun-stroke or other disease, would everywhere be recognized as a sufficient and reasonable cause for dismission from office.

The distinction which plainly differentiates the law upon which this indictment is based from all the statutes cited, or from their similars, is that they all proceed upon some plainly-seen effect of the thing prohibited upon the public service directly, as hereinbefore suggested.

Jurisdiction cannot be established by assuming that Congress saw that the act enjoined or prohibited might have some possible effect upon a person's capacity to discharge official duty. If it could, that jurisdiction would thereby be so amplified as to embrace everything which an official may do, or refrain from doing—not *as* an official, but as a man. Sumptuary laws may be passed, dictating what an officer or employee may, or may not, eat, drink, or wear, in order to be kept in the condition of health in which he can most efficiently perform the Government's work. It might be argued that unfortunate domestic relations impair, or happy ones promote the capability for a prompt and proper discharge of official duty; and thus be deduced a power to regulate the subject of the marriage and divorce of United States officers and employees. Such a chain of reasoning would be as logical as that which undertakes to bring the act of Aug. 15, 1876, c. 287, § 6, under either of the grants found in the eighth section, Article 1 of the Constitution.

It is only laws "necessary and proper" to effect

Constitutional purposes, that Congress is empowered to enact.

It cannot determine conclusively for itself the existence of the necessity for, nor the propriety of, its legislation; otherwise, its jurisdiction would be practically unlimited, instead of being restricted within comparatively narrow bounds.

When by the passage of a law, on the one hand, and refusal to recognize its commands, upon the other, the issue of its necessity and propriety—and, consequently, of its validity—is raised, it is one for judicial investigation and determination.

Cooley, Const. Lims., 44–45, and notes; Leiber, Civ. Lib. and Self-Gov., 162–164; De Tocqueville, Dem. in Am., c. 6; Story on Const., §1842.

Marbury v. Madison, 1 Cranch, 176–178;

Osborn v. U. S. Bank, 9 Wheaton, 89;

DeChastellux v. Fairchild, 15 Penn St., 18, per Gibson, C. J.;

Bates v. Kimball, 2 Chipm., (Vt.), 77.

Van Horne v. Dorrance, 2 Dall (U. S. C. C.), 309;

Bowman v. Middleton, 1 Bay, 252.

Grimball v. Ross, Charlton, (Ga.), 175.

Beebe v. State, 6 Ind., 501, *et seq.;*

Cronise v. Cronise, 54 Penn St., 263, top, affirming Jones v. Jones, 12 Penn. St., 356–7.

McCauley v. Brooks, 16 Cal., 39 *et seq.*, per Field, C. J.

Bayard v. Singleton, 1 Martin (No. Car.), 42.

See also Mr. Webster's speech on the Independence of the Judiciary, 3 Webster's Works, 29.

Similar language used in Whittington v. Polk, 1 H. & J., 243.

The Legislature no more represents the sovereignty of the people than either of the other departments. All equally derive their authority from the same high source.

Bailey v. Phila., &c., R. R. Co., 4 Harr. (Del.), 402–403.

This court must say, then, whether or not the act in question is a law "necessary and proper" to *carry into execution* any vested power.

Chief Justice Marshall's authoritative definition of the above-quoted phrase is, of course, familiar. The summing up of his exhaustive discussion is;—

"Let *the end* be legitimate; let *it* be within the scope of the Constitution, and all means *which are appropriate*, which are *plainly* adapted to that end, which are not prohibited, but *consist with the letter and spirit of the Constitution*, are constitutional."

McCulloch v. Maryland, 4 Wheaton, 421.

In his Commentaries, Story says of this case, and of the language of the Constitution;—"It requires that the means should be, *bona fide*, appropriate to the end."

2 Story on Const., § 1253 *et seq.*

The inquiry before us, then, is;—does this Statute seek—by appropriate means, adopted in good faith for that purpose—an end legitimate to be accomplished by federal legislation?

We claim that—whether its design be that stated by the District Attorney to the jury(*i. e.*, to prevent the use of money in political campaigns) or, as his associates assumed, to protect office-holders from "political assessments"—it does not seek any object legitimatized by the Constitution; nor seek any end by *means* sanctioned by the constitution; that the method adopted is not adapted to either of the objects above-mentioned, nor to *any* constitutional object; and if either of those suggested be the true purpose, the means are not adopted in good faith to accomplish it.

First, then, as to the end sought.

What this is must be determined from the *terms*

of the Statute itself, irrespective of theory; because "nothing is more common than for a law to effect more or less than the intentions of the persons who framed it; and it must be judged of *by its words and sense*, and not by any private intentions of the members of the legislature." 2 Story on Const., § 1268, last sentence.

Atty.-Gen. v. Sillem, 2 H. & C., 530–531, per Bramwell, B.

Aldridge v. Williams, 3 Howard, 24; State Tonnage Tax cases, 12 Wallace, 217.

Just as it reads, the plain and *only* purport of this statute is to forbid pecuniary co-operation among federal officers and employees of inferior grade—numbering (we are told) nearly 100,000 citizens—for *any political purpose whatsoever*, national, state, municipal, or other.

A political purpose, I understand to be a design to affect the government, or some branch, or department, or subsidiary agency of it, in its administration, composition, or policy;—whether by a change of men or of measures.

"All political power is inherent in the people"; *i.e.*, in *the* people within the limits of whose sovereignty, determined territorially or otherwise, that power is to be exercised, and to which it pertains. In framing the Federal Constitution, the people delegated to the nation so much power as they judged sufficient (whether so in fact, or not, 92 U. S., 549) for the performance of its functions. The residue, with certain very important restrictions in their own behalf, they confided to the state governments.

The boundary between the several states is territorial; between each of them and the nation, it is subjective; yet, to the judicial perception, it is as well defined "as if the line of division was traced by landmarks and monuments visible to the eye." (21 Howard, 516.) Whatever arbitrary power may attempt or accomplish, legally the barrier between

the two jurisdictions is impassable, although the same persons may be subject to both.

The "political purposes" of each are to be declared, attained, or sought, only by *its* people; and, until our frame of government is changed, the people of the United States can constitutionally entertain and execute no purpose unless it relate to a *subject* of national jurisdiction.

In his Philosophy of Law, §§ 17, 164, 169, etc., Broom states the primary test of criminality to be, whether or not the act in question is prejudicial to the public. It goes without saying, that he means *the* public whose rights it affects. Except as the citizens are concerned in the execution of the few delegated powers, the United States have no public, outside the District and territories, &c. Elsewhere, and as to all other matters, the people are *the State's public.*

This dual relation must be constantly borne in mind, in considering the extent of the power of national legislation. It is entirely ignored in this statute.

Read U. S. v. Cruikshank, 92 U. S., 549 to 551.

Thus, every citizen is held obedient to two sovereigns.

One sovereignty, however, can command only as to a few, highly important, matters; as to everything else, its laws should be silent or unheeded. As to those matters, its injunctions are equally imperative to every citizen, whether holding official relation to it or not.

True, there are some crimes which, as technically defined, none but an agent *can* commit. For instance, embezzlement, which in another would be larceny. Yet, the jurisdictional element (*i. e.*, the misappropriation of government property), is the same in each case. Many similar instances might be cited.

The sum and substance of it all is, however, that the United States, properly, only defines and pun-

ishes, as criminal, such acts as affect the proper discharge of its own functions.

Evidently, the present law is not intended for any such purpose. Accepting the statements of its advocates, its end is the protection of the *individual*, and not of the *function*. This is not "legitimate." This law has no tendency to facilitate the collection of revenue; the settlement or sale of public lands; the safety of the currency; the prompt and proper delivery of the mails, or adjustment of accounts; in short, *any* governmental purpose of the Union.

It is purely *personal* in its design and operation.

If the giving and receiving of value for political purposes is arbitrarily forbidden, and not in order to protect the officer or employee, it is still more illegitimate; because it then loses all *pretence* of being in the interests of justice and freedom of action.

As a protective measure, it is no more justifiable than an attempt to secure the person or property of an official from aggression in any other form. It is not an offence of federal cognizance to steal a postmaster's overcoat, or a collector's hat. This is clear to you. Yet, the defendant's counsel has been represented as contending that thieves and gamblers cannot, for such bad conduct, be dismissed from the government service. On the contrary, in former argument, as now, he conceded the *right* to dismiss for *any* impropriety, and the *power* to do it for any cause; because the style of hat worn offends the aesthetic eye. But if the thief or gambler—being outside any *place* jurisdiction over which is ceded to the nation—neither steals, nor gambles for, government property, he cannot be punished in *this* court for larceny or gambling, simply because employed in the federal service; nor because he and the person wronged are both so employed. A very recent case illustrates this. The accused, possibly, may be tried *here* for purloining invoices; *not* for advising another to throw herself beneath a moving train. This point is e'aborated because the confu-

sion of ideas is not confined to the newspapers. It existed in the mind of the proposer of this legislation.

As before urged, if employment imposes the duty, or confers the right, of protecting the *property* of the employed at all, it exists to the fullest extent. If the nature of the office does not fix the limit of proper protection, there is none.

Marriage and divorce, to which I have referred, are, it is true, matters within *the police power* of the several States. But there *can* be nothing more manifestly within the scope of this power than voluntary contributions for political purposes within, and pertaining to the affairs of, a State.

Properly, it can be no concern of the general Government that General Curtis, a citizen of New York, received money from other citizens of that State, for use in a campaign preceding, and culminating in, a *State* election.

It is the province of the *State* to regulate the manner in which all property shall be acquired, held, used and transferred within her borders: whether by deed, will, *gift*, or otherwise. 2 Kent Com., 437.

There is as little right, in the general government, to regulate *gifts* within this State, as there is to declare a general law as to making other contracts.

Without the consent of New York, the United States cannot even accept for itself the gift of property lying within our jurisdiction; though to do so would directly tend to reduce the public debt, diminish taxation, aid the common defense and promote the general welfare.

U. S. v. Fox, 94 U. S. 315; 52 N. Y., 530.

Just across Hudson River, the U. S. can take by gift; simply because the laws of New Jersey permit it.

If the United States cannot take by gift in this State, without our consent, *a fortiori*, it cannot say

that our own citizens, within our jurisdiction, shall not transfer property in that way, whether for political or other purposes.

If one Congress can say that our citizens, in federal employ, *shall* NOT *give for a stated purpose* (not federal), *the next may*, with equal authority, *say such citizens* SHALL *give*, for *any* purpose Congress may choose to dictate. In the form of taxation, it may say our citizens *shall* give, for a national purpose; but it has no right to say whether they shall or shall not give for a purpose not affecting the nation.

Concede all the hardship upon the subordinate in office, and all the evils incident even to the "levying of political assessments;" yet the penal legislation of the Federal Government cannot afford the remedy; although dismissal from service may be decreed.

If the state of things assumed to exist, and against which this enactment is supposed to be directed, is *contra bonos mores;*—yet, we must remember, the United States is not *censor morum*—except to the extent mentioned. In Wynehamer v. People, 13 N. Y., 386, Comstock, J., quotes and italicizes this sentence from Blackstone;—"Besides, *the public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal law.*"

The *police power* regulates "the intercourse of citizen with citizen."

Cooley, Const. Lim.,* 572; 1 Dillon, Mun. Corp., § 141.

Com. v. Alger, 7 Cush., 82, 84 to 86.

"In the American Constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and *it cannot be taken from them*, either wholly or *in part*,

and exercised under legislation of Congress." Cooley, Const. Lim., 713 of last edition, citing

License Tax Cases, 5 Wallace, 471;

U. S. v. De Witt, 9 Wall., 41, and Patterson v. Kentucky, 97 U. S., 504;

U. S. v. Reese, 92 U. S., 214;

R. R. v. Fuller, 17 Wall, 568, top;

U. S. v. Cruikshank, Id., 542.

Munn v. Ill., 94 U. S., 124, 125;

R. R. v. Husen, 95 U. S., 470, 471;

U. S. v. Fox, *Id.*, 672;

Beer Co. v. Mass., 97 U. S., 25;

Fertilizing Co. v. Hyde Park, *Id.*, 659;

People v. Draper, 25 Barb., 374;

Same Case, on app., 15 N. Y., 562, 563;

Gibbons v. Ogden, 9 Wheaton, 203; *N. Y. v. Miln*, 11 Peters, 133–4, and 139;

Slaughter House Cases, 16 Wallace, 62, citing Thorpe v. R. R., 27 Vt., 149.

The State's reserved right, to regulate the conduct (*inter sese*) of her citizens, is of too vital importance to be argued away by forced constructions or strained inference.

"No interference by Congress with the business of citizens, transacted within a State, is warranted by the Constitution, except such as is *strictly* incidental to the exercise of powers *clearly* granted to the legislature." 5 Wallace, 471, top, *i. e.*, "*clearly* incidental" to an express power, if not expressly given.

9 Wheaton, 204, top.

Certainly, it is not '*strictly* incidental' to taxation.

Of a much more plausible deduction, the U. S. Supreme Court declared, through its late Chief-Justice: "This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an *appropriate* and *plainly*-adopted means for carrying into execution the power of laying and collecting taxes."

U. S. v. DeWitt, 9 Wallace, 44.

The Statute there drawn in question was Sec. 29 of the Internal Revenue Act of March 2, 1867, c. 169, (14 Stats., 484) punishing the sale of taxable oil inflammable at less than 110° Fahrenheit. It was held to be a mere police regulation, not within Congressional authority, and void. *Id.*

A like Statute by a State held constitutional, although the oil was made under a U. S. patent granted DeWitt; exemption from such State legislation not being considered fairly deducible from the patent, or the power under which it issued.

Patterson v. Kentucky, 97 U. S., 501, 502, *et seq.*,

Affirming Patterson v. Com., 11 Bush, 311.

Veazie v. Moor, 14 Howard, 574–5.

The right and duty of the State to guard its citizens from moral danger, (and to determine its existence and cause) is the same as it is with regard to physical perils.

In addition to the numerous citations before given, decisions analagous to that cited from 97 U. S., 501, *et seq.*, have repeatedly been announced, both in the Federal and State Courts, under the prohibitory liquor laws of the States, and the U. S. laws, imposing license fees or special taxes.

License Cases, 5 Howard, 573 to 632.

Bartmeyer v. Iowa, 18 Wallace, 129–141.

Congress can prescribe a uniform rule of naturalization, but not for the conduct of a naturalized citizen. It can declare how he can become a citizen, but not his rights as a citizen. It cannot control his whole life, because made a citizen under its legislation. Neither can it, upon like ground, control the ordinary acts of one holding a Federal office,

Osborn v. U. S. Bank, 9 Wheaton, 827–8.

The police power is one which the State cannot surrender. To permit it, would be to allow the Legislature to give up the functions for the discharge of which the State exists.

Beer Co. v. Mass., 97 U. S., 33, middle;

Boyd v. Ala., close of opinion, per Field, J., 94 U. S., 650;

Met. Bd. v. Barrie, 34 N. Y., 667, bottom, and 668 top.

However important the object, real or assumed, of this legislation "yet it is equally important that there be no usurpation of jurisdiction." U. S. v. Cahill, 3 Crim. Law. Mag., for March, 1882, 197, and 9 Fed, Rep., 80, cited *infra*.

This statute is an unwarrantable assumption of power, not only because it undertakes to dictate to citizens of New York (if you please) as to a transaction between themselves, within her borders, not affecting the federal government; but still more, because this dictation is as to a matter which does vitally affect the State of New York as a body politic.

We have shown that either as a mere transfer of property by gift, or as a regulation of conduct, it is only the State of New York that could legislate on this subject for her citizens, who *ought* to refuse submission to any other dictation in this behalf, until the authority to dictate be conclusively established.

We say, further, *the State* has a right to complain of the assumption. Not only are her citizens entitled to unite their contributions for "political purposes," but *she is entitled to have them contribute*, if they will, *subject to no other restrictions than she may think it reasonable to impose*. There are ballots to be printed, necessary expenses to be borne, for which *somebody* must pay. The State might well conclude that speakers, debate, public meetings in halls and tents, were desirable for the elucidation before the people of the topics upon which they were to pass at the polls; and might fairly object to any attempt upon the part of another (usurping) sovereign to trammel any portion of her citizens as

to their political action, in pecuniary or other respects.

She may well assert their right to combine *at will* to have spoken, printed and circulated speeches and arguments for and against free canals;—or any other issue you please.

Of all matters pertaining to State affairs "pending campaigns" and elections are those with which the general government has the least right to meddle; because they are the corner-stones of an independent political organization.

Vindicating the fourth section of the first article of the Federal Constitution, Hamilton writes, with the emphasis of italics;—"Its propriety rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation.*" He proceeds to add, in a subsequent paragraph;—"Suppose an article had been introduced into the Constitution, empowering the United States *to regulate the elections for the particular States;*—would any man have hesitated to condemn it, both *as an unwarrantable transposition of power*, and as a premeditated engine for the destruction of the State governments? The violation of principle, in this case, would have required no comment; and to an unbiased observer, it will not be less apparent in the project of subjecting the existence of the National Government, in a similar respect, to the pleasure of the State Governments. An impartial view of the matter cannot fail to result in a conviction that *each*, as far as possible, *ought to depend on itself* for its own preservation." Federalist, No. 59.

"It is clear that no federal Statute can interfere with voters except at an election for representatives in Congress; and then only as to their protection in voting for Representative in Congress. Hence, it is essential to be charged in the indictment that, 'at an election for representative,' &c., the offence was committed; and it is not suffi-

cient to allege that 'at an election at which a representative was *voted for*,' &c. *It may be that the election in question was for some other purpose over which the Federal Government had no control, and with which it had no right to interfere.*"

U. S. v. Cahill, per Treat, J., in 3 Crim. Law, Mag., for March, 1882, pp. 196–198, and in 9 Fed. Rep., 80.

Interference with a "pending campaign" is obnoxious to the same objection as to meddling with a State election.

Neither the United States, nor any State, can constitutionally pass such a law as this, because it violates *natural right*.

Speaking of these rights, Cooley, J., says; "There are some things too plain to be written," even in a constitution. 24 Mich., 107, cited *infra*.

"Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former." 2 Webster's Works, 392. 1 Bla. Com., 124. 2 Story's Life, 278, letter to Dr. Lieber.

Calder v. Bull, 3 Dallas, 388, top; Wilkinson v. Leland, 2 Peters, 657.

In Bartmeyer v. Iowa, 18 Wall., 132, middle, Miller, J., mentions, as existing outside of constitutions, those "general principles supposed to limit *all* legislative power." See, too, Merrill v. Sherburne, 1 N. H., 213, near top, per Woodbury, J.

People v. Supervisors, 4 Barb., 74–5;

Benson v. Mayor, 10 Barb., 244–5;

Powers v. Bergen, 6 N. Y., 366–7;

Goshen v. Stonington, 4 Conn., 225.

Especially see, *People v. Hurlbut*, 24 Mich., 107, *et. seq.*, cited *sup.*

Also, read *Lee v. State*, 26 Ark., 265, *et seq.*

Not only does this *kind* of legislation assail that entire freedom of political action which is the very fundamental idea of republican institutions,—upon

which nation, states and constitutions rest,—but it violates the spirit (and, indeed, the letter) of the declaration in the first Amendment, that freedom of speech and of the press shall not be *abridged.* U. S. Const., Amend. 1.

Look at language of this amendment:—

"Congress shall make no law respecting an establishment of religion, or prohibiting the *free* exercise thereof; or *abridging* the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances."

Indubitably, it would be a violation of this provision for Congress to enact that none of the 100,000 government officials should give anything to the Methodist Church (for instance), though left free to hold such religious tenets as they pleased, and to preach and pray accordingly. The exercise of religion is not *free*, unless every one can give of his means *freely*, without control, in its support, and to promulgate its doctrines.

In like manner, freedom of speech and of the press is *abridged* if every citizen cannot, *at will*, contribute to cause the speech to be made, in a suitable place; and, when made, that it may be disseminated, to accomplish the 'political purpose' for which it is intended.

Freedom of the press is not simply the right to *print.* It is, pre-eminently, the right to *publish;* which, necessarily, involves the right to receive aid, from whomsoever has the means and desire to give, that the publication may be effected.

So, the right to assemble includes the right to hire Faneuil Hall, or any other convenient place, in which to hold the meeting; and the right of every citizen who makes one of that assembly, or chooses to aid its object (political or other) to give toward the hire of the hall, and other expenses.

"The right to life includes the right of the indi-

vidual to his body, in its completeness, and without dismemberment; the right to liberty, the right to exercise his faculties, and to follow a lawful avocation for the support of his life; the right of property, the right to acquire, possess and enjoy it in any way consistent with the equal rights of others, and the just exactions and demands of the State."

Bertholf v. O'Reilly, 74 N. Y., 515, middle, per Andrews, J.

A more severe blow at free discussion was never dealt than this law, which says of 100,000 citizens that they shall not give, *at their own good pleasure*, to have it carried on; and the deadly stroke is given in the name of political liberty, and under the banner of "*reform!*"

This law is void because it overthrows that EQUALITY *of rights* which belongs to every citizen. It sets a seal of inferiority upon a class, denying to all whom it embraces a privilege which every other person in this broad land possesses.

In terms, Amendment XIV is restrictive upon the States, as the first nine were upon the United States, yet of these it was well said that they "are declaratory of the great principles of civil liberty, which can be infringed neither by national nor the the State governments." Campbell v. State, 11 Geo., 353.

The United States was bound to respect the equal rights of the citizen, before the late amendment were adopted.

In 1818, Levi Woodbury, who had recently taken his seat upon the bench of his native State, declared that "*an act which operates on the rights* or property *of only a few individuals*, without their consent, *is a violation of the equality of privileges guaranteed to every subject.*"

Merrill v. Sherburne, 1 N. H., 212, cited ante.

Denying to a specified class the right to fish in the

waters of the State is depriving that class of the equal protection of the laws.

In re Ah Chong, 2 Fed. Rep., 737, Sawyer, C. J.

See opinion of same able Judge, In re Tiburcio Parrott, 1 *Id.*, 481.

In this last case those in which the "privileges and immunities" of citizens have been discussed are cited; especially the familiar passage from Mr. Justice Washington's opinion in Corfield v. Coryell, 4 Wash., C. C., 371, adopted in Ward v. Maryland, 12 Wallace, 430, and in The Slaughter House Cases, 16 *Id.*, 76.

Upon the next page the Court say it was not the purpose of the 14th Amendment to transfer the security and protection of all the civil rights mentioned from the States to the Federal Government. 16 Wall., 77.

If not transferred for protection, they cannot be (as to 100,000 citizens) for the purposes of invasion and abridgement.

Whatever rights citizens have, the 14th Amendment says shall be shared equally; (*Id*); and this statute does not comply with that requirement.

In his powerfully-reasoned dissenting opinion, Field, J., asserts for every citizen "the right to pursue the ordinary avocations of life *without other restraint than such as affects all others*, and *to enjoy equally with them the fruits of his labor.*" 16 Wall., 90, middle.

"To enjoy equally" means *to use just as unrestrainedly as every other citizen.*

The same distinguished jurist, in his opinion in "the Queue Case," as courageous as it is able, after referring to legislation against the Catholics, &c., says:—"But, in our country, hostile and discriminating legislation by a State against persons of any *class*, sect, creed or nation, *in whatever form it may be expressed*, is forbidden by the fourteenth amendment to the Constitution." [Cited.] "The equality

of protection thus assured to everyone whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others, for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that *no charges or burdens shall be laid upon him which are not equally borne by others;* and that, *in the administration of criminal justice he shall suffer for his offenses no greater or different punishment.* (Ho Ah Kow v. Nunan, 5 Sawyer, 562.)

I will add, that he shall suffer *no* punishment for an act which in another is justifiable and commendable.

In another paragraph Judge Field observes:—

"It is certainly something in which a citizen of the United States may feel a generous pride, that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, *come from what quarter it may*, is caught upon the broad shield of our blessed Constitution and our *equal* laws." (*Id.* 563.)

"What government owes to society, and *all* it owes, is the impartial administration of *equal* and *just* laws." Sharswood, Prof. Ethics, 20.

———

In some instances, where the general terms of a law might seem to embrace an area beyond the legislative jurisdiction, the courts have narrowed the statute by construction to persons and things which might properly be made amenable to it.

This was done with regard to the acts requiring stamps to be placed upon judicial process, and making unstamped instruments inadmissible in evidence. They were generally held applicable to Fed-

eral tribunals, some holding they were not intended to apply to State courts, and others that Congress could not extend them beyond the national Courts.

Carpenter v. Snelling, 97 Mass., 452.
Moore v. Quirk, 105 Mass., 51, § 2.
People v. Gates, 43 N. Y., 40.

In the before cited case of U. S. v. Cahill, Treat, J., observed:—

"It would hardly be contended that, because Congress may pass a law to control congressional elections, and protect voters against unlawful or violent interference with the right to vote for congressional representatives, therefore, whatever occurred at an election which did *not* interfere with *such* a right must be considered within the terms of the act, because the words are general, viz.: 'Unlawfully prevents any qualified voter of any State * * * from freely exercising the right of suffrage,' etc. The language must necessarily be so construed as to confine the provisions of the statute within constitutional limits." 9 Fed. Rep., 82.

3 Crim. Law. Mag., March, 1882, p. 197.

That cannot be done here; first, because the statute does not, like R. S., Sec. 5511, under which the last-cited case arose, confine itself to "any election for Representative or Delegate in Congress"—nor, indeed, to an election at all; and second, because the indictment does not allege the transaction to be with reference to such, or to any, election or other subject-matter of federal jurisdiction.

Congress cannot say that certain officers and employees shall not give or receive any money or thing for "political purposes" generally, and leave the courts to construe it to mean "any federal purposes."

If this were competent, the indictment does not allege, nor the proof show anything of the kind. But it is not comptent. It is not possible to separate the unconstitutional from the constitutional, if any part could be deemed so. 92 U. S., 221.

"It would certainly be dangerous if the legisla-

ture could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will, when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and *attempts that which is beyond its reach*, the courts are authorized to, and when called upon in the due course of legal proceedings must, annul its encroachments upon the reserved powers of the States and the people.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

U. S. v. Reese, 92 U. S., 221.

"It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy; but it does not say so, and we cannot supply qualifications which the legislature has failed to express."

U. S. v. Fox, 95 U. S., 672-3.

The history of the times shows that the legislative power is constantly striving to overpass the bounds deliberately set to their authority; and that the people are compelled to place new barriers against evil legislation, and to call frequently upon the courts to see they are not scaled or overthrown. Commenting upon the report of "the Queue case," in 18 Am. Law Reg., 676, Judge Cooley says:

"It is a matter of every-day obversation that *legislatures are accustomed to treat constitutional limitations as imposing no moral obligation* whatever upon their members;" and there is therefore a constant effort to evade, rather than to observe, them.

18 Am. Law Reg., 684.

Possibly Judge Cooley might (or might not) omit

or soften his language, if it were intended to appear in the Michigan Reports : but, in the preface to the second edition of his work on Constitutional Limitations, he uses the like. After remarking that his book was originally "written in full sympathy with all those restraints which the caution of the fathers had imposed upon the exercise of the powers of Government" * * * * and "endeavored to point out that there are on all sides definite limitations which circumscribe the legislative authority, *independent of the specific restrictions which the people impose by their State constitutions,*" he adds :

"Further reflection has only tended to confirm him in his previous views of the need of constitutional restraints at every point where agents are to exercise the delegated authority of the people; *and he is gratified to observe that in the judicial tribunals the tendency is not in the direction of a disregard of these restraints.*"

Another distinguished jurist writes:—

"It is worth while to remark that in every new and amended State Constitution, the Bill of Rights spreads over a larger space; new as well as more stringent restrictions are placed upon legislation. There is no danger of this being carried too far: as Chan. Kent appears to have apprehended that it might be. There is not much danger of erring upon the side of too little law. The world is *notoriously* too much governed. Legislators almost invariably aim at accomplishing too much. Representative democracies, so far from being exempt from this vice are, from their nature, peculiarly liable to it." Sharswood, Prof. Ethics, 22, 23.

In Pres. Woolsey's edition (A. D., 1875) of Dr. Lieber's "Civil Liberty and Self-Government," an editor's note to page 161 observes that

"Specific checks on legislative powers are coming more and more into use. The people are beginning to distrust the legislatures, as they formerly did the executives."

They should distrust *both*. "The price of liberty is eternal vigilance."

Prior to 1860 the jealousy of the dominant power

restricted the national government too much in the exercise of powers it undoubtedly possessed. With the war, in the desperate struggle to defend and assert itself, and in protective measures since, undoubtedly the proper limitations upon its authority have not been sufficiently regarded.

II.

That the parties to the transaction should be executive officers or employees of a certain class specified, is a jurisdictional fact, essential to confer upon the Court any authority to try the cause. Its judgment against one not in the Federal service, or in it by Presidential appointment, or in any other than an *executive* office or employment is utterly void.

The nature of Gen. Curtis' relation to the United States is given in the record, Exhibit 12.

It shows him not to be an *executive* officer or employee.

III.

The judgment was unauthorized because both Vogelsang and Treichel were "officers" and not (as alleged in the indictment) "employees."

The statute makes and recognizes this distinction.

Act of Aug. 15, 1876, c. 287, § 6. (19 Stats., 169; Richd. Sup., 245.)

See Sec. 5 of the same act, (*Ib.*, Richd. Sup., 244.)

Other statutes make like discrimination. R. S., Sec. 5483, and *passim*.

If employee were broad enough to cover both, had not both been mentioned, the enumeration of these

different classes of public servants requires the distinction to be observed in the indictment and proof under it. 2 East's Crown Law, 616, § 48.

Loom's case, 1 Moo. C. C., 160; Puddefoot's case, *Id.*, 247;

Rex v. Douglas, 1 Camp., 212; Hooker v. State, 4 Ohio, 350;

Alkenbach v. People, 1 Denio, 80; *State v. Copp*, 15 N. H., 217.

20 Johns, 494.

The Courts have defined the status of each.

An officer must be appointed as the Constitution requires, &c.

An employee is hired from day to day, or as occasion demands.

Compare U. S. v. Hartwell, 6 Wall., 385, with U. S. v. Germaine, 99 U. S., 508.

U. S. v. Moore, 95 U. S., 762, middle; Twenty Per Cent Cases, 13 Wall., 568.

Each of the men named in the first and eighth counts held "an office," *with every single element which the Supreme Court has mentioned as going to constitute a man an "officer,"* as contra-distinguished from an employee. 99 U. S., 511, bottom.

1. Peter Vogelsang was appointed by "the head of a department." (Record, 42, 43.)

This fixed his "*tenure*;" i. e., "manner of holding," 6 Wall., 393; 99 U. S., 511, bottom. He continued in office, regardless of any change of collector.

He was paid a "*salary*," *by the year*. This implies "duration" and "emolument." *Ibid.*

He held a specified position (messenger) with defined "duties." *Ib.*

It is immaterial that he was known as a "clerk." A clerkship is a grade of office. R. S., Sec. 2644, speaks of "clerks and *other* officers of the customs." Hartwell was "clerk," appointed under act of Aug.

6, 1846, c. 90, § 13. 9 Stats., 62. Yet he was held to be an officer. 6 Wall., 385.

By R. S., Sec. 2630, deputy-collectors "are declared to be *officers* of the customs;" yet their salaries, in common with those of the other officers known as clerks are to be fixed by the Secretary of the Treasury. R. S., Sec. 2634.

Exhibit 21 (Rec., 42) abolishes certain "offices," and discontinues "employees."

The instruction (Rec. 57, folio 226) was improperly given.

2. All that is said above applies to Mr. Treichel, whether designated as Auditor, Assistant Auditor, or clerk. (Exhibit, 24. Record, 44.)

It further appears, affirmatively, that he took an oath of "*office*." (Record, 49.)

EDWIN B. SMITH,
Of Counsel.

STANLEY, CLARKE & SMITH,
Attorneys for Petitioner,
160 Broadway,
New York.

BURGOYNE (Telephone No. 587), 29 Rose St.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1882.

EX PARTE,

NEWTON M. CURTIS,
Petitioner, &c.

Original, No.

Memorandum of Petitioner's Reply.

If the postulate that the United States is entitled to the "*full and undistracted attention*" [italicized thus at the top of page 4 of the Solicitor General's brief] and "*all the time*" [italicized at bottom of page 5, same brief], of its employees, be true to the extent of making that proposition a sufficient foundation for the legislation under consideration, then Congress may not only regulate the domestic relations of these employees, and subject them to sumptuary laws, &c., but may say no such employee shall divert his attention from public employment long enough to give a penny for religious purposes;—certainly, that he shall not devote any of his time to attendance upon church services, or distract his mind with theological problems.

Political and religious liberty are put upon an equal plane by the Constitution. The right,—under any plausible (or other) pretext whatsoever,—to restrain the freedom of action of a Federal employee as to political affairs necessarily implies a like power of control over religious conduct.

It is not within the capability of human nature for a man to be perpetually engaged, without intermission, in the actual duties of that employment which constitutes his vocation;—to give it his "full and undistracted attention * * * *all the time.*" Lex non cogit impossibilia.

We hesitate not to re-affirm that *no* republican government, State or National, has any right—under *color* of regulating, official conduct, or otherwise—to make such exactions of its officer as shall deny him the right, or deprive him of the opportunity, to exercise the ordinary privileges of an elector and of a citizen.

But, further, under the peculiar character of our frame of government, neither the United States nor the several States have the constitutional right to exact such continuous attention to official duties as shall deprive their respective employees of the right and opportunity to perform those acts which are fundamental in the relation of the citizen to the State.

As heretofore observed, the various statutes cited by the government (assuming them all to be legitimately enacted) pertain entirely to the correct discharge of the particular official duties to which they severally relate—as an analysis of them will show; but it is an insult to the understanding to say that the giving of a few dollars, more or less, in support of the political or religious ideas in which one believes, or permitting the use of a hall for their propogation*—has any tendency to corrupt the public service, or impair the efficiency of the public ser-

---

* *E. g.*, under this statute, a customs officer of an inferior port (*i. e.*, one "not appointed by the President," &c.), cannot permit the use of his hall, gratuitously, by the post-master of the village to discuss postal reforms, or other political questions; nor even lend a flag, or a chair, or other "thing of value," for a like purpose.

vant. Yet, *this* is the action which this statute prohibits; and if in this particular void, it is void *in toto.*

EDWIN B. SMITH,
Of Counsel.

STANLEY, CLARKE & SMITH,
Attorneys for the Petitioner,
160 Broadway,
New York.

FILED
OCT 9 1882
JAMES H. MCKENNEY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

Ex parte
NEWTON M. CURTIS. } Petition for habeas corpus.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

Ex parte
NEWTON M. CURTIS. } Petition for habeas corpus.

BRIEF FOR THE UNITED STATES.

This writ of habeas corpus is asked for by the petitioner in order to relieve him from imprisonment under a judgment of the circuit court for Southern New York; that judgment having been rendered upon his conviction under an indictment *charging him an employé of the United States, with having received money, &c., for political purposes from other employés of the Government*, contrary to the Statute of 1876, ch. 287, section 6. (19 Stat., 169; Rich. Suppl. 245.)

That section is as follows:

> That all executive officers or employés of the United States not appointed by the President with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from any other officer or employé of the government any money or property, or other thing of value, for political purposes; and any such officer or employé who shall offend against the provisions of this section shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding five hundred dollars.

The indictment is, in substance, as follows:

COUNT 1. The jurors, &c., present that Newton Martin Curtis, &c., being then and there an employé of the United States not appointed by the President of the United States with the advice and consent of the Senate of the United States, to wit, an employé of and compensated for his services in the sum of five hundred dollars each month by the Treasury Department of the United States, having theretofore been employed at the compensation aforesaid by the Secretary of the Treasury of the United States, and then and there acting as an expert for the United States to investigate certain cases and matters pending in the courts of the United States, in which the United States were interested, a more particular and definite description of the employment, duties, and compensation of him the said Newton Martin Curtis as such employé being as yet to the jurors aforesaid unknown, did unlawfully and knowingly receive from one Peter Vogelsang the sum of five dollars for political purposes; *that is to say*, money to the amount of five dollars was then and there paid by him, the said Peter Vogelsang to and received by him the said Newton Martin Curtis knowingly for the treasury of a certain political organization and body, of which he the said Newton Martin Curtis was then and there a member, known as the Republican State Committee of the State of New York, for the purpose of defraying the expenses of said committee in and about a certain political campaign then and there pending and then and there managed by said committee on behalf of a certain political party known as the Republican party, a more particular and definite description of which said purposes being to the jurors aforesaid as yet unknown, he the said Peter Vogelsang, as he the said Newton Martin Curtis then and there well knew, being then and there an employé of the Government of the United States not appointed by the President of the United States with the advice and consent of the Senate of the United States, to wit a messenger in the custom-house of the United States at the city of New York, and as such messenger compensated by the United States then and there, against the peace, &c. * * * * *

COUNT 8. That Newton Martin Curtis, &c. [as above] * * * * * * did unlawfully and knowingly receive from one Charles Treichel a certain thing of value, to wit the bank check

of the said Charles Treichel payable to the order of him the said Newton Martin Curtis of the denomination and value of one hundred dollars, for political purposes, *that is to say*, &c. [as above].

The question thereupon is as to the constitutional validity of the statute to confer jurisdiction upon the court below over the offense specified in this indictment.

No question as to mere pleading is competent. If it be allowable for the legislature to make the provision, and if this indictment be not for a matter unprovided for, then no matter if the offense has been set forth defectively, the writ will not be issued.

This is submitted as the substance of the rule in the cases of *Lange*, 18 Wall., p. 163; *Parks*, 93 U. S. 18, and *Siebold*, 100 U. S., 371.

Neither is there any need to examine into the *policy* of the act of 1876. Concurrence or non concurrence by the court in the judgment of Congress as to that policy, supposing that this court would volunteer an expression of either, is of no significance here.

If the person and subject-matter be under legislative supervision, then the rule of living for the person as to the subject-matter is for the legislature to determine.

Can a court say that it is legally absurd, *i. e.*, unconstitutional, for the legislature to declare that no employé of the government shall become a trustee holding money for political purposes?

No nice *enumeration* of the powers conferred by the Constitution upon the legislature is required here. For

it seems beyond controversy that the Federal legislature can make provision to secure to the United States the *full and undistracted* attention of all who accept office under them, to the same general extent that this can be done by any government. There is no distinction in this respect betwixt the States and the United States. Such provisions are plainly "necessary and proper" for the execution of Federal powers expressly granted by the Constitution, or rather necessarily incident to all governments as such. They are rather to be spoken of as *imperative* than as merely *competent*.

Let the above statute be analyzed. It prohibits certain officers of the government from engaging in certain voluntary public employment outside of their office; and to that end punishes all such officers as directly or indirectly violate such command, *i. e.*, those who solicit or who accept, and those who solicit others to accept, such employment.

If it be competent for the legislature to regulate such matter at all, then the mode and measure of the regulation is a matter *exclusively* for them to pass upon. If they can prohibit a Federal officer from giving *one-half* of his time to some other public duty, then, upon the principle of *obsta principiis*, they can prohibit the least employment of such sort. If they can prohibit all employment, they can also select for such prohibition any one, leaving others for future consideration. So, also, they may limit such prohibition in the first instance, or permanently, to one class of officers.

It will not be denied that one who receives money for political purposes thereby becomes a trustee in behalf of some *public* purpose. If the legislature can say that

a person having employment under the government shall not hold a distinct employment thereunder (little or large, short or long), shall not hold office or be a public trustee under a State, or a county, or a town, as I suppose cannot be denied, why may it not do so where the beneficiary is a person or association engaged in some other public business, although merely voluntary, or indeed some private business? It seems that the legislature might prohibit an officer of the United States from becoming a guardian, or executor, or private trustee, and, if it be competent for it to pass upon the propriety of such additional employment, that it may also prescribe the penalty to follow disobedience, so it be not "excessive," &c., and may go further, and punish other persons who co-operate in procuring such disobedience, especially where, as in the present instance, such person *also* is an employé of government. All such details are matters of a discretion reposed by the Constitution in a co-ordinate department which has its own organs for its guidance thereabouts—*organs* which the judiciary has not, and does not desire, much less wish to pass judgment upon, *i. e.*, in censuring or approving the *effects* produced by them.

The following statutory provisions are examples of the exercise of similar power over Federal officers; some of them proceeding upon the principle that the United States are entitled to *all the time* of certain officers employed by them, and therefore have a right to require of these a discharge of other offices *without compensation.*

Such legislation is enforced by courts, not because *they approve of its policy*, for they have no capacity to pass upon that, but because *they cannot see that it is unreasonable*. Whether the Secretary of the Treasury shall *own a sea vessel*, or a Treasury clerk shall *trade in funds of a State*, or an officer of the United States doing business with a bank *be at same time an agent of such bank*, are matters for the legislature to pass upon, just as much as, but no more than that other question, whether an officer of the United States may act as trustee holding money for political purposes.

SEC. 243. No person appointed to the office of Secretary of the Treasury, or First Comptroller, or First Auditor, or Treasurer, or Register, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States, or take or apply to his own use any emolument or gain for negotiating or transacting any business in the Treasury Department, other than what shall be allowed by law; and every person who offends against any of the prohibitions of this section shall be deemed guilty of a high misdemeanor and forfeit to the United States the penalty of three thousand dollars, and shall upon conviction be removed from office, and forever thereafter be incapable of holding any office under the United States; and if any other person than a public prosecutor shall give information of any such offense, upon which a prosecution and conviction shall be had, one-half the aforesaid penalty of three thousand dollars, when recovered, shall be for the use of the person giving such information.

SEC. 244. Every clerk employed in the Treasury Department who carries on any trade or business in the funds or debts of the United States, or of any State, or in any kind of public property, or who takes or applies to his own use any emolument or gain for negotia-

ting or transacting any business in the Department, shall be deemed guilty of a misdemeanor, and punished by a fine of five hundred dollars and removal from office.

SEC. 1763. No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

SEC. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; nd no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

SEC. 1788. Every officer of the United States concerned in the disbursement of the revenue thereof who carries on any trade or business in the funds or debts of the United States, or of any State, or in any public property of either, shall be deemed guilty of a misdemeanor, and punished by a fine of three thousand dollars, and shall, upon conviction, be removed from office, and forever thereafter be incapable of holding any office under the United States.

SEC. 1789. Every officer concerned in the collection of the revenues of the United States who carries on any trade or business in any public property of the United States, or of any State, shall be deemed guilty of a misdemeanor, and punished by a fine of three thousand dollars, and shall, upon conviction, be removed from office, and forever thereafter be incapable of holding any office under the United States.

I append the Opinion that was delivered in this case below by His Honor Judge Wallace.

S. F. PHILLIPS,
Solicitor-General.

United States Circuit Court, Southern District of New York.

THE UNITED STATES
against
NEWTON M. CURTIS.

JULY 20, 1882.

WALLACE, J.:

While we have not overlooked the several rulings upon the trial which are impugned by the defendant, our principal attention has been directed to the point most strenuously pressed upon the argument relating to the constitutionality of the act of March 15, 1876, upon which the indictment proceeds.

The act prohibits "all executive officers or employés of the United States not appointed by the President with the advice and consent of the Senate," from "requesting, giving to, or receiving from, any other officer or employé of the government any money or property, or other thing of value for political purposes."

We cannot profess to be ignorant that this law was enacted in order to interdict practices which had become a topic of extended animadversion. But although it may have been aimed at the suppression of the practice which has prevailed among party organizations of soliciting contributions for party purposes from their office-holding members, or exacting them by a moral coercion, and although its provisions may be well calculated to effect this object, it does not follow that it can be sustained as a legitimate means to that end. No person can be indicted under it for any other act than the one precisely designated. Whatever may have been the attendant circumstances, and however they may have qualified the moral complexion of the transaction, the person indicted can only be tried for doing the thing which the statute prohibits; and unless this of itself, isolated from all its concomitants, can be competently made a crime by Congress, the statute is nugatory.

It is insisted for the defendant that it is not within the constitutional power of Congress to make the giving or requesting or receiving of a voluntary contribution for political purposes by a subordinate government official a criminal offense. It is to be observed, however, that the prohibition applies only when there is concerted action between officials in this behalf. The question, then, is whether it is competent for Congress to prohibit co-operation between officials in the raising of funds for political purposes.

Undoubtedly it is lawful for Congress to prescribe all needful regulations for the discipline of government officials, and to declare what infractions of discipline shall be treated as criminal offenses. The power to prohibit acts of officers or employés which are incompatible with the proper discharge of their duties, or which impair the efficiency or tend to demoralize the public service, is essentially to promote the end and object of government; and this power resides in the legislative department of the government.

In executing this power Congress must, of necessity, exercise its judgment and discretion in determining what acts are or are not of such a pernicious character and tendency. This legislative discretion embraces a large field, and its boundaries cannot always be readily located. It is only when Congress has palpably transgressed the limits of its discretion that the judicial department will intervene.

Such a case might arise if Congress should attempt to prohibit an act of a nature pertaining so exclusively to the sphere of private conduct that it could not by any implication impinge upon official deportment or official discipline. We are not able to say that the acts prohibited by the present statute are of such a character. We cannot affirm that Congress transcended its discretion in prohibiting transactions between officials which create the relation of donor and donee and introduce party interests into the public service; nor that Congress erred in assuming that the influences springing from this relation and these interests should be discouraged as liable to deflect the independence and impartiality which must rule official intercourse. Many instances may be found in the laws of Congress where this legislative discretion has been exercised. It suffices to refer to one contained in the act of February 1, 1870, which prohibits any officer or clerk, in the employ of the government, from making any gift or present to an official superior. It is not necessary to maintain that the co-operation of officials in raising funds for political objects is essentially demoralizing to the public service or subversive of discipline. It is sufficient to justify the exercise of the legislative discretion if the prohibited acts tend to introduce interests which disturb the just equipoise of official relations. If it is suggested that it is the right and the duty of every good citizen to aid in promoting such political objects as he deems to be wise and beneficial, and that Congress has no constitutional power to abridge that right, the answer is, that no citizen is required to hold a public office, and if he is un-

willing to do so upon such conditions as are prescribed by that department of the government which creates the office, fixes its tenure, and regulates its incidents, it is his duty to resign.

In reaching the conclusion that the statute is not obnoxious to the objections which have been suggested, we have given force to the presumption in favor of its constitutionality which it is the duty of the judiciary to apply to all legislative enactments. This presumption should prevail in all conflicts of interpretation and all doubtful implications of constitutional power, so as, if possible, to sustain the validity of legislative action.

We have examined the minor points raised upon the argument and presented in the brief of counsel relating to the rulings upon the trial, but do not deem it necessary to discuss them. We think them to be without merit.

The motion in arrest of judgment and for a new trial is denied.

O

SUPREME COURT U.S.
FILED
OCT 23 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

IN THE MATTER

OF

NEWTON MARTIN CURTIS,

Petitioner.

Petition for Writ of Habeas Corpus.

BRIEF FOR THE GOVERNMENT.

EVERETT P. WHEELER,
FREDERICK W. WHITRIDGE,
Of Counsel.

NEW YORK:
EVENING POST JOB PRINTING OFFICE, 208 BROADWAY, COR. FULTON ST.
(Law Telephone No. 541.)

1882.

Supreme Court of the United States.

EX PARTE

NEWTON MARTIN CURTIS,
PETITIONER, &C.

Brief for the Government.

This matter comes before the Court upon the order of the Chief Justice, dated New York, July 24, 1882, adjourning to this Court the consideration of the matters presented by the application of Newton Martin Curtis for a writ of *habeas corpus*, dated July 20, 1882, and upon the return by Henry E. Knox, United States Marshall, to the writ issued thereon, which return is dated July 24, 1882. The said Curtis was convicted and sentenced for a violation of the Act of Congress of August 15, 1876, chapter 287, section 6, and the single question before the Court we understand to be as to the constitutionality of that statute.

First Point.

The Meaning and Purpose of the Statute.

The language of the statute in question, is as follows:

"SEC. 6. That all executive officers or employees of the "United States, not appointed by the President, with the

" advice and consent of the Senate, are prohibited from re-
" questing, giving to, or receiving from any other officer
" or employee of the Government, any money or property,
" or other thing of value for political purposes;

" And any such officer or employee who shall offend
" against the provision of this section shall be at once dis-
" charged from the service of the United States;

" And he shall also be deemed guilty of a misdemeanor,
" and on conviction thereof shall be fined in a sum not ex-
" ceeding five hundred dollars."

These terms are perfectly clear, and we cannot understand from its language alone that the statute means anything more, or anything less, than an absolute prohibition upon a designated class of Government employees from either requesting, giving to, or receiving from any other officer or employee of the Government, any money or equivalent of money for any kind of political purposes. Such payments and requests of every kind are forbidden, and no distinction is made between those which are voluntary, and those which are involuntary.

It may be conceded that there is no express provision in the Constitution which authorizes such a statute. It is safe to assert that it never even glimmered upon the mind of any member of the Convention of 1787 that the time would come when the officers and employees of the Government they were founding would ever request from, and give to each other, or to anybody else, hundreds of thousands of dollars for political purposes.

Such conditions calling for the enactment of such a law, rose long after the formation of the Constitution. They could not have been foreseen, and the remedy for them could not have been expressly authorized. This statute is, however, maintained to be within the implied powers of Congress, and within the express power to enact all laws which are "necessary and proper" to carry the enumerated powers into effect. To determine whether it does come within those powers, there is to be considered first the meaning of the statute which is to be discerned in its language, as illustrated by the statements of its advocates and the circumstances attending its passage, the intention of the Legislature, and second, the

conditions which it was intended to meet, and which caused Congress to consider its enactment necessary and proper.

I.—The Intention of Congress.

At the time of the introduction of the bill into the House, the mover, Mr. Whitehouse, said :

"The reduction made by the committee on appropriations of these salaries is called for by the necessities of the people who are overburdened and now weighed down by excessive taxation, both local and national. The whole people, without regard to party lines or politics, pay their taxes to sustain the national government. Fully recognizing that fact, the committee on reform in Civil Service have instructed me to report the amendment I have sent up to the clerk's desk in the way of addition to the pending action of the bill.

"It is estimated that this reduction in salaries will not make any material difference to the employees of the Government, as my amendment *will relieve them from the assessments made for party purposes*, and enable each party to enter upon its political campaign or canvass upon equal terms. For this reason I have been instructed to submit this amendment, which I hope the House will adopt."

Objection having been made to the consideration of the bill as not germane to the appropriation bill to which it was an amendment, the objection was overruled by the Chair, who said : "*It is clearly a mode of protecting the appropriations*, and it is also germane to this section of the bill."

During the debate Mr. Randall also said : "We want to protect your clerks from being levied upon" (*Cong. Record, vol.* 4, *Part III. p.* 2808). It appears to be clear from these extracts that the object of the House in passing the bill was to prohibit what is known as political assessments, and that the bill was not directed against merely voluntary contributions, as has been contended. In the passage of this law, therefore, Congress acted with a definite object in view, and with definite motives, and did not impose for vague reasons, a vague restriction upon an innocent practice.

The meaning and purpose of the statute may, perhaps, still further be discerned from the following resolution, which was passed at the beginning of the same session at which this law was enacted. Upon January 6, 1876, the House of Representatives resolved:

"That, in the opinion of this House, the practice of making assessments against clerks, employees and other officers of the Government, for political purposes, or for the purpose of obtaining means to assist any person or political party in conducting a political campaign, is wrong in principle, demoralizing in tendency, disastrous in effect; is opposed to purity and honesty in the public service, and economy in the administration of the Government; is fruitful of higher salaries, in order to provide money with which to pay such demands, and in every way antagonistic to the best interests of the country. Therefore, in view of these facts, it is further the opinion of this House that the committee in the judiciary should, at an early day, report to the House a bill to prohibit all such demands as assessments, as well as to prohibit the payment thereof, if made."

Cong. Record, vol. 4, *P. I.*, 44*th Con.*, *p.* 298.

It is also to be noticed that Congress did not, as has been asserted, hastily pass this law. The bill was introduced into the House April 27, 1878, and did not finally become a law until August 15. It underwent important changes during its passage, and it was considered several times by a conference committee, of which Senators Allison, Bayard and Windom, and Representatives Kasson, Morrison and Randall, were the members. Congress did not, therefore, proceed unadvisedly or hastily, but deliberately intended to provide a definite remedy for a known evil. In the language of its mover, the object of the bill was to relieve employees of the Government "from assessments made for party purposes."

II.—The Practice of Political Assessments.

It is, therefore, proper to inquire what was the practice of political assessments which Congress thought it was necessary and proper under the Constitution to prohibit by means of the law in question. Generally speaking, political assessments are an income tax levied upon office holders by the political party in power for the support of that party. It prevails in many parts of the country, as well with reference to municipal and State, as to national offices. The assessment of national office holders is, however, alone here to be considered. The first instance of which we have been able to find any record occurs in the report of a House Committee of the 25th Congress, upon the case of Swartout. A deputy collector of New York there testified as follows:

"I have frequently been called on to contribute to political objects while I was deputy collector, as an officer of the Custom House. The amount was from $20 to $100. The tax was *pro rata* according to salary. It bore a proportion of from one to six per cent. I believe nearly all the officers of the Custom House, indoors and out, and the clerks, were similarly taxed, and generally paid what they were assessed. It was assessed by the General Committee of the Tammany Hall party, and for the support of the Tammany Hall party. If the individual did not pay the amount he was taxed with, the collector would remark, 'You will be reported to the General Committee,' and everybody well understood proscription would follow. The collector of the General Committee has an alphabetical book containing the names of persons taxed, and the amount each individual is requested to pay."

During the Covode investigation, also, it appeared that the campaign funds of one political party were at that day collected in part from office holders and contractors. The system, however, appears to have been first perfected by the Congressional Committee established by the Republican party in 1866. The present practice, dating from that time, is as follows: This Congressional Committee, in the years when elections for Congressmen are held, issue a circular to all persons whose names appear upon the official register of

the United States, requesting of them "a voluntary contribution" of an amount which is specified in each case, and which usually amounts in the first instance to two per cent. of the salary of the person to whom it is addressed. Subsequently it is the practice of this committee in each year when a presidential election is to be held, and sometimes in other years also, to issue to the same persons a second circular for a second "voluntary contribution" of a sum which is likewise specified, and which usually amounts to one per cent. of the salary of the addressee.

The following are copies of those two circulars issued in 1880:

"HEADQUARTERS OF THE
REPUBLICAN CONGRESSIONAL COMMITTEE, 1880,
1317 F STREET, NORTHWEST, WASHINGTON, D. C.

WASHINGTON, D. C., April 19, 1880.

Sir,—This committee is organized for the protection of the intetests of the Republican party in each of the Congressional districts of the Union. In order that it may prepare, print, and circulate suitable documents illustrating the issues which distinguish the Republican party from every other, and may meet all proper expenses incident to the campaign, the Committee feels authorized to apply to all citizens whose interests or principles are involved in the struggle. Under the circumstances in which the country finds itself placed, the Committee believes that you will esteem it both a privilege and a pleasure to make its fund a contribution which, it is hoped, may not be less than . The Committee is authorized to state that such voluntary contribution from persons employed in the service of the United States will not be objected to in any official quarter.

The labors of the Committee will effect the result of the Presidential as well as the Congressional struggle; and it may, therefore, reasonably hope to have the sympathy and assistance of all who look, with dread, upon the possibility of the restoration of the Democratic party to the control of the Government.

Please make prompt and favorable response to this letter by bank check or draft, or postal money order, payable to the order of Geo. Frs. Dawson, Treasurer, P. O. Lock Box 723, Washington, D C.

By order of the Committee,

EDWARD MCPHERSON,
Secretary."

"HEADQUARTERS OF THE
REPUBLICAN CONGRESSIONAL COMMITTEE, 1880,
1317 F STREET, NORTHWEST, WASHINGTON, D. C.

WASHINGTON, D., C. October 14, 1880.

Sir,—The splendid achievements of the 12th of October show what Republicans can do when their blood is up.

This committee has yet much to do to meet the energy of Democratic desperation and make our coming victory complete.

To make assurance doubly sure, its hands should be strengthened.

It, therefore, appeals to you to promptly contribute to its funds an additional one per cent. of your salary.

It makes this appeal to your patriotism—to the patriotism of a Republican who desires not alone the election of Garfield, but also that of a working majority in both Houses of Congress—in the full expectation of a hearty and prompt response.

You have hitherto sustained it nobly, and assurances crowd upon it that you are not weary of well doing.

Remit, as before, to Geo. Frs. Dawson, Treasurer, P. O. Lock Box 723, Washington, D. C.

J. A. HUBBELL,
Chairman.

EDW. MCPHERSON,
Secretary."

The following is a copy of the second circular issued by the same committee in the present year:

HEADQUARTERS OF THE
REPUBLICAN CONGRESSIONAL COMMITTEE, 1882,
No. 620 THIRTEENTH STREET, NORTHWEST.

WASHINGTON, D. C., August 15, 1882.

JAY A. HUBBELL, *Chairman.*
D. B. Henderson, *Secretary.*

EXECUTIVE COMMITTEE.

Hon. W. B. Allison,	Hon. Horace F. Page,
Hon. Eugene Hale,	Hon. W. H. Calkins,
Hon. N. W. Aldrich,	Hon. Thomas Ryan,
Hon. Frank Hiscock,	Hon. W. D. Washburn,
Hon. Geo. M. Robeson,	Hon. L. C. Houk,
Hon. Wm. McKinley, Jr.,	Hon. R. T. Van Horn,
Hon. George R. Davis,	Hon. Orlando Hubbs,
Hon. Horatio G. Fisher.	

Sir,—Your failure to respond to the circular of May 15, 1882, sent to you by this committee, is noted with surprise.

It is hoped that the only reason for such failure is that the matter escaped your attention owing to press of other cares.

Great political battles cannot be won in this way. This committee cannot hope to succeed in the pending struggle if those most directly benefited by success are unwilling or neglect to aid in a substantial manner.

We are on the skirmish line of 1884, with a conflict before us, this fall, of great moment to the Republic, and you must know that a repulse now is full of danger to the next Presidential campaign.

Unless you think that our grand old party ought not to succeed, help it now in its struggle to build up a new South, in which there shall be, as in the North, a free ballot and a fair count, and to maintain such hold in the North as shall insure good government to the country.

It is hoped that by return mail you will send a voluntary contribution equal to two per cent of your annual compensation as a substantial proof of your earnest desire for the success of the Republican party this fall, transmitting by draft or postal money order, payable to the order of Jay A. Hubbell, acting treasurer, Post Office lock box 589, Washington, D. C.

By order of the Committee,

D. B. HENDERSON,
Secretary.

In addition to the assessments thus levied upon federal office-holders by federal officers, it is the practice of the local committees having charge of the Republican canvass in several of the States to levy still another assessment upon the federal office-holders and employees within their respective States, which assessments usually amount to three per cent. of the salaries of such office-holders. The amount requested is specified in each case, and while such requests are always for "voluntary contributions," the language in which some of the letters are couched is wholly inconsistent with the theory that the contributions are in fact in any sense voluntary. If the first request for a "voluntary contribution" is not promptly responded to, other letters of a more or less threatening character are sent. The following, for instance, is a copy of the third letter issued by the Republican State Committee of Pennsylvania in 1880:

"PHILADELPHIA, Oct. 25, 1880.

Dear Sir,—Our books show that you have paid no heed to either request of the committee for funds. The time for action is short. I need not say to you that an important canvass like the one now being made in a State like Pennsylvania requires a great outlay of money, and we look upon you *as one of the federal beneficiaries* to help bear the burden. Two per cent. of your salary is ———. Please remit promptly. *At the close of the campaign we shall place a list of those who have not paid in the hands of the head of the department you are in.*

Yours truly,

JOHN CESSNA,
Chairman."

The defendant herein is prosecuted for participation in levying the assessments in New York in 1881. The precise character of these assessments can be seen more clearly from the following circulars, which are copies of all of those issued by the New York State Committee in 1880:

"STATE OF NEW YORK,
REPUBLICAN STATE COMMITTEE,
FIFTH AVENUE HOTEL.
NEW YORK, August 27, 1880.

Sir,—Remembering the interest you take in the welfare of the Republican cause, and in view of the great importance of the coming election, the Republican State Committee respectfully request a contribution of $ (one-half before September 3d), towards the necessary expenses of the Presidential campaign in New York State.

Checks or postal orders should be made to the order of John N. Knapp, Esq., Treasurer.

Very respectfully,

EDW'D M. JOHNSON,
Secretary."

The amount in this case was three per cent. on the annual salary.

"STATE OF NEW YORK,
REPUBLICAN STATE COMMITTEE,
FIFTH AVENUE HOTEL.
NEW YORK, September 13, 1880.

Sir,—Under instructions from this committee, on the 26th of August last a circular was mailed to you with the expectation that you would respond before September 3d.

The Republican State Committee respectfully invite your immediate attention to this matter, and hope to hear from you without further delay.

Very respectfully,
T. C. PLATT,
Chairman of Executive Committee."

"STATE OF NEW YORK,
REPUBLICAN STATE COMMITTEE,
FIFTH AVENUE HOTEL,
NEW YORK, September 28, 1880.

Sir,—This committee instructs me to call your attention to the circular sent you August 27, asking you to contribute $15 (in two monthly payments, the first one before September 3), towards the necessary expense of the Presidential campaign in New York State, and to say that, as you have not yet paid the first installment, it is important that the whole sum asked for be paid *before October* 3, in one payment.

Checks for postal orders should be made payable to the order of—

Yours, very respectfully,
JOHN N. KNAPP,
Treasurer."

"STATE OF NEW YORK,
REPUBLICAN STATE COMMITTEE,
FIFTH AVENUE HOTEL,
NEW YORK, October 16, 1880.

My Dear Sir,—By the direction of this committee, on the 27th of August, I mailed you our circular asking for a contribution towards the necessary expenses of the campaign in New York State, in support of the Republican cause, at the Presidential election.

On the 13th of September Mr. T. C. Platt, chairman of our Executive Committee, sent you a circular calling your attention to the fact that, at that date, the Republican State Committee had received no response to its first request.

Another circular reminding you of this matter was sent you on the 28th of September by Mr. J. N. Knapp, treasurer.

As we have not heard from you, and in order that there may be no misunderstanding, please let me know, by return mail, if you have failed to receive them.

Yours respectfully,
EDW'D M. JOHNSON,
Secretary."

"FIFTH AVENUE HOTEL,
NEW YORK, October 27, 1880.

My Dear Sir,—Below you will find a schedule of your subordinates, who have several times been asked to contribute the sum set opposite their respective names towards the expense of the campaign in this State.

You will find opposite each name the amount yet due. The total unpaid at this date, and due from the emyloyees in your office therefor, appears to be——

Your immediate attention to this matter is very important.

By order of the Executive Committee.
HENRY A. GLIDDEN,
Secretary."

The last of these letters deserves particular attention because it was addressed to the head one of the most important offices in New York City, and speaks of the amounts unpaid by his subordinates as "due" to the committee, and evidently implies that he was to find some way of causing what was "due" from them, to be paid.

The highly organized system of collecting "voluntary contributions" from office-holders of the United States, thus set forth in the foregoing letters, constitutes the practice of political assessments referred to in the debate upon the bill, and is evidently the evil it was the purpose of this statute to remedy. The meaning of the statute, as shown by its language and by the intention of the Legislature, together with the facts with which it was to deal, are thus apparent.

Second Point.

The Statute is not an Infringement of any Right Guaranteed by the Constitution, and is not Forbidden by any Article in the same.

It was claimed below by the defendant, that "this law was in violation of the first and fourteenth amendments to the

Constitution." It was said that "neither the United States, nor any State, can constitutionally pass such a law as this, because it violates natural rights," and that "this law is void because it overthows that equality of rights which belongs to every citizen."

We do not undertake to consider what "the natural and inherent rights" of an office-holder, or any other man, are. It is, however, certain that the full enjoyment of a man's natural, by which we understand his wholly untrammelled, rights, is inconsistent with his existence in a state of civilized society. The undisputed right of man to do whatever he pleases, does not exist except in a state of barbarism, where might is law.

We understand that the law and that this court, takes no cognizance of any "natural or inherent rights of man," but only of his legal rights; and that the inquiry in this case is, whether the law in question deprives any class of persons of any of their legal rights, or whether it restricts them in the exercise of any such rights, and if it does so restrict them, whether the general welfare requires that such restriction shall be imposed.

It has not been very clearly pointed out, of precisely what right office-holders are supposed to have been deprived by this statute. It is, however, very clear that the Constitution does not expressely declare that they shall be protected in paying money to other office-holders for political purposes. The proposition that this statute is an infringement of the first and fourteenth amendments does not seem to us worthy of very serious attention, and rests upon a very vague notion of what the constitutional right of free speech, and the constitutional equality of rights, really are.

These propositions rest, moreover, upon a fundamental misconception of the nature of political office. It is certainly not the constitutional right of every citizen to have an office. Political office is merely a trust which is to be conferred upon whatever conditions the Government chooses to impose. If the conditions are unacceptible to the office-holder, he is under no obligation to take the office, and he has no constitutional or other right to require the conditions of the trust he accepts to be sub-

quently altered or removed. The sufficient answer to these propositions is, in the language of the court below, "that no citizen is required to hold a public office, and if he is unwilling to do so upon such conditions as are prescribed by that department of the Government which creates the office, fixes its tenure and its incidents, it is his duty to resign."

Fed. Rep., Vol. XII., page 824.

In considering the propriety of this law, it may, however, be desirable to examine other laws of Congress which in greater or less degree also affect individuals, by interference with their individual action in certain cases, and which thus afford a practical construction of the Constitution upon the points here involved.

Sec. 243 *Rev. Stats.* restricts the right of any person appointed to the office of Secretary of the Treasury, or First Comptroller, or First Auditor, or Treasurer or Register, to directly or indirectly be interested in trade or commerce, or be owner of any sea vessel, or any public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States, or take or apply to his own use any emolument or gain for negotiating or transacting any business in the Treasury Department, other than what shall be allowed by law. Any person so offending shall be guilty of a high misdemeanor, fined and removed from office.

Sec. 243 *Rev. Stats.* restricts the right of every clerk employed in the Treasury Department to carry on any trade or business in the funds or debts of the United States, or of any States, or in any kind of public property, or to take or apply to his own use any emolument or gain for negotioting or transacting any business in the department, and it provides that if he does so he shall be deemed guilty of a misdemeanor, and punished by a fine of five hundred dollars and removed from office.

Sec. 329 *Rev. Stats.* restricts the right of the Comptroller of the Currency, either directly or indirectly, to be inter-

ested in any association issuing national currency under the laws of the United States.

Sec. 452 *Rev. Stats.* restricts the right of the officers, clerks and employees in the General Land Office from directly or indirectly having, or becoming interested in the purchase of any of the public land.

Sec. 1358 *Rev. Stats.* restricts the right of officers of certain prisons to be interested in any way in any contract on account of such prisons.

Sec. 1546 *Rev. Stats.* restricts the right of any officer or employee of the Government to request any working man in any navy yard to contribute or pay any money for political purposes.

Sec. 1688 *Rev. Stats.* restricts the right of persons employed in the diplomatic service of the United States to wear certain kinds of clothing not authorized by Congress.

Sec. 1784 *Rev. Stats.* restricts the right of certain officers of the United States to be presented with gifts by other officers, or to make such gifts, or to subscribe or to ask subscriptions for the purchase of such gifts.

Sec. 1789 *Rev. Stats.* restricts the right of revenue officers to engage in certain trades or business.

Sec. 2078 *Rev. Stats.* restricts the right of certain persons to trade with the Indians.

Sec. 2158–2162 *Rev. Stats.* restricts the right of all persons to engage in the carrying of the subjects of China Japan or any other Oriental country, known as Coolies.

Sec. 3867 *Rev. Stats.* restricts the right of all persons not connected with the letter carrier branch of the postal service to wear a particular kind of clothes.

Sec. 4607 *Rev. Stats.* restricts the right of certain persons to solicit any seaman to become a lodger at the house of any person letting lodgings for hire.

Sec. 5353 *Rev. Stats.* restricts the right of all persons to deliver packages of nitro-glycerine on board passenger vessels or vehicles.

Sec. 5389 *Rev. Stats.* restricts the right of all persons to circulate certain kinds of literature.

Sec. 5452 *Rev. Stats.* restricts the right of all persons engaged in the importation of goods, wares and merchandise into the United States, to give presents of any sort to officers of the revenue.

Sec. 5455 *Rev. Stats.* restricts the right of all persons to harbor or assist certain persons who have been in the army or navy of the United States.

Sec. 5487 *Rev. Stats.* restricts the right of all persons acting as pension agents, to receive fees from pensioners.

Sec. 5498 *Rev. Stats.* restricts the rights of all officers of the United States Government from acting as the agent or attorney for the prosecution of any claim against the United States.

Each of these statutes restricts the right of the individual to do what he pleases, or interferes with his disposition of his private property, in the same manner as the statute here under consideration. In each of these cases, and in every similar case, such rights of the individual are properly restricted under the Constitution, because the general welfare requires that such restriction shall be imposed, and it is confidently submitted that neither any one of them, nor the law in question, improperly deprives any individual of any of his legal or constitutional rights.

Third Point.

The law is within the implied powers of Congress and is expressly authorized by Art. I, Sec. 8, of the Constitution.

That article gives Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department of office thereof."

I.—The Nature and Extent of the Implied Power of Congress.

Under the authority of this section, the right of Congress has been asserted, in the greatest variety of instances, to pass laws for which no express authority can be found in the Constitution. New conditions and exigencies arise with which Congress is called upon to deal, and which were not and could not have been provided for in the Constitution. This must, in the very nature of things, be so, unless all material progress, and the social and political development of the people are to be arrested. New fields will continually be opened up, within which the national sovereignty must necessarily be exercised, and in a manner which could not have been foreseen by the fathers. The invention of the telegraph, for example, and the legislation in reference to telegraph lines, is an instance of this principle. Madison, referring to this clause, says:

"Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated, too, not only to the existing state of things, but to all the possible changes which futurity may produce, for in every new application of a general power the *particular powers*, which are the means of at-

taining the object of the general power, must always neecssarily vary with that object."

So Chief Justice Marshall, speaking of this section of the Constitution, says:

"The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which the Government should, in all future time, execute its power, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if forseen at all, must have been seen dimly, and which can be best provided for as they occur."

McCulloch *vs.* Maryland, 4 Wheat., 415.

So Mr. Justice Story says:

"The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the *means* by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might in the end prove the overthrow of the system itself. Hence the powers are expressed in general terms, leaving to the Legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers as its own wisdom and the public interests should require."

Martin *vs.* Hunter, 1 Wheat., 304.

And, again, in his work on the Constitution, Judge Story says :

"The powers contained in a Constitution of government, especially those which concern the general administration of the affairs of the conutry, such as its finances, its trade, and its defense, ought to be liberally expounded in advancement of the public good. This rule does not depend on the particular form of a government, or on the particular demarcations of the boundaries of its powers ; but on the nature and objects of government itself. The means by which national exigencies are provided for, national inconveniences obviated, and national prosperity promoted, are of such infinite variety, extent and complexity, that there must of necessity be great latitude of discretion in the selection and application of those means."

Story on Constitution, sec. 1251.

II.—THESE POWERS MAY BE APPLIED AT THE DISCRETION OF CONGRESS WHEN IT IS NECESSARY, IF PROPER MEANS BE EMPLOYED.

Necessity alone is the test of the existence of any incidental implied power, such as that to pass the law here in controversy. A wide discretion is left to Congress to decide whether application of the power is or is not necessary in any particular case, and if there is any relation of the means to the end the judiciary is limited to the enquiry, whether the means employed are proper or repugnant to the Constitution.

Anderson *vs.* Dunn, 6 Wheat., 215.
McCulloch *vs.* Maryland, 4 Wheat., 316.
Van *vs.* Central Pacific R. R., 52 Cal., 63.
Metropolitan Bank *vs.* Van Dyke, 27 N.Y., 400.

In the latter case, the Court of Appeals, speaking of the omission of the Constitution to make certain prohibitions upon Congress which it made upon the States, says :

"And the reasonable and legitimate deduction from such omission is, that the other things not prohibited to Congress

were allowed to be exercised by it, if those matters came within the purview of either the express or implied powers granted."

In re Jackson, 14 Blatchford, 245, 249, Mr. Justice Blatchford says:

"The meaning of the clause in the Constitution (art. 2, sec. 8) that Congress shall have power 'to make all laws which shall be necessary and proper to carry into execution the foregoing powers,' has been settled by judicial construction.

"It does not mean that no law is authorized which is not indispensably necessary to give effect to a specified power. Congress possesses the choice of means, and is empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution (United States *v.* Fisher, 2 Cranch, 358, 356).

"The necessity spoken of in the clause is not to be understood as an absolute one, but Congress is to be allowed that discretion, with respect to the means by which the powers conferred on it are to be carried into execution, which will enable it to discharge the high duties assigned to it in the manner most beneficial to the people. If the end is legitimate and within the scope of the Constitution, then all means which are appropriate, and are plainly adapted to that end, and are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional; and, if a particular measure is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, an enquiry by a court into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to tread on legislative ground" (McCulloch *v.* State of Maryland, 4 Wheaton, 421, 423; Legal Tender Cases, 12 Wallace, 539). * * *

And at page 252 the court says:

"Under the power to establish post-offices and post-roads, it must be held, that Congress has the right to prescribe what it will carry along the post-road as part of the mail, and what it will not carry, and to render its enactments efficient by punishing as an offense the violation of them. Whether certain things shall be excluded or not is a matter for the sound discretion of Congress, and the discretion of a court cannot be substituted for the discretion of Congress. The discretion of Congress cannot be fettered by the consideration that a given thing was generally or even universally allowed to be carried in the mail when the Constitution was adopted."

It remains only to be shown that the prohibition is *necessary*, which is a question of fact to be decided in the light of the circumstances in each case, and that only proper means have been employed.

First.—The necessity for the prohibition of political assessments appears from an examination of the working of the system itself. It is demonstrated by the effects of that practice upon office holders themselves, upon the efficiency and character of the public service, and by its general effect upon society at large. Habitual assessments should be forbidden, as a protection to office holders themselves from a most distracting annoyance. In most of the circulars, indeed, the contributions are carefully called voluntary, and they are usually so spoken of. But, as a matter of fact, they are not voluntary. They are radically different from contributions for other social or political purposes which are really voluntary. These contributions for political purposes are solicited by those in authority, or by those who are likely to have special influence with the appointing power, the particular amount wanted is designated, and it is spoken of as something which is "due." As a matter of fact, such assessments amount to a species of extortion. They are paid under duress, very often at a great personal sacrifice, and under the influence of the fear of losing place and means of livelihood through the success of the party out of power, or through dismissal by the party in power as a means of punishment for not having paid them. It is easy to perceive the virtual compulsion which has been brought to bear upon office holders, aside from distinct threats like Mr. Cessna's, by reflecting upon the effect of some of the circulars of 1880, which were signed by Mr. T.C. Platt. Mr. Platt, at that time, was known to be a candidate for the United States Senate, and as a person, therefore, likely to have great influence over the Federal appointments in this State. At the head of other circulars appeared the name of one of the candidates for the Vice-Presidency, as that of the chairman of the committee. It was well known that he might become President, and that he might, therefore, have great, and possibly all, power over the official lives of those from whom he, to-

gether with his associates, thus requested this percentage of their respective salaries. It is idle to argue that the average employee of the Government would feel perfectly free to give or to refuse the particular sum which was so imperiously demanded by one, among others, who might soon have the power of at once depriving him of his income. Under such circumstances it is obvious that the contributions would be in no ordinary sense of the word "voluntary." In fact, a great and improper pressure is brought to bear on office holders to induce them to make contributions, and the requesting of them amounts to a species of extortion to which the Government of the United States ought not to allow its employees to be subjected.

The amount of the contributions themselves forms moreover, a complete answer to the supposition that they are voluntary and proper. The assessments in the year of each Presidential election amount, as shown by the above circulars, to six per cent. of the office holder's salary. The great majority of those assessed are persons whose salaries do not exceed $2,000 per annum. Prudent persons with such incomes do not give away six per cent. of their salaries for any one purpose whatsoever, except under the pressure of some real or fancied necessity.

It is immaterial whether office holders have in fact been dismissed from office and deprived of their means of support by reason of their failure to pay such assessments, or fear they will be. Instances could be shown in which that has been done. The essential point is, that they are under the impression, whether erroneously or not, that they are compelled to pay their assessments. And, therefore, the greater number of them do pay, and thus virtually pay an exorbitant and illegal income tax to one political party.

Many statements could be produced to show that the assessments are thus paid. A recent distinguished collector of this port, for instance, is known to have remonstrated with his subordinates for the non-payment of their assessments, and to have laid down the doctrine that a man took office under the Government under the implied contract to pay a portion of his salary to the party which procured him his office. So instances are known to us, in which officers have prided themselves on being prompt in the payment of

their assessments, on the ground that those in authority would remember it in their favor, and that it would be of advantage to them in their positions. So also since this prosecution was begun, government officials have come to members of the Civil Service Reform Association and expressed their gratitude that it had been begun, and declared that they and their friends in the service would be glad of such a reason as the conviction of General Curtis would furnish, for not hereafter paying the assessments which they could so ill afford. These facts are irreconcilable with the theory that these contributions are in any sense voluntary.

They rather demonstrate that a sort of coercion is exercised upon the office holders, and that an illegal tax is thereby levied upon them, against which Congress may, if it deems the efficiency of the public service to be impaired, relieve them or against which it should relieve them if for any other reason it deems it necessary and proper so to do.

The effects of the practice of political assessment upon the public are not less important than those upon the office holders themselves, and such effects alone afford a sufficient reason for the prohibition of the practice. The money which is raised becomes inevitably a source of corruption. It cannot be positively stated how much money is raised by means of these assessments. From the most trustworthy sources of information to which access can be obtained, however, it may be positively asserted that at least $100,000 has usually been raised respectively by the Republican Congressional Committee and by the Republican State Committee of New York. The precise amount is known to very few persons, and no regular accounts are kept of the receipts or expenditures. What accounts are kept are not audited, and the expenditure is in the hands of one or two persons who are responsible to nobody. The disbursement of these sums may be entirely proper, but experience has shown that such irresponsible expenditure is a direct and fruitful and most insidious source of corruption. It is only necessary, for instance, to refer to the well known fact that in the City of New York a large class of persons exists, the members of which have no occupations and are without property, but who yet find a means of livelihood in the pursuit of "politics," to demonstrate the truth of this supposi-

tion. The fact that large sums of money are thus raised to be expended in elections—the purity of which the law takes every precaution to preserve, and that no account is ever rendered of the manner of such expenditure—is of itself sufficient to require Congress to so legislate as to prevent the collection of the funds to be so expended.

An indirect and certain, though as yet not well developed effect of the system of "voluntary contributions" which are so disproportionate to the salaries of those who pay them, is the demand for an increase of salaries in order to meet these unreasonable demands, or in default of such increase, the danger of resort to downright unlawful means to supply the deficiency. It ought to be apparent that these effects were to be anticipated, but we have also the direct testimony upon this point of Mr. John Kelly, than whom upon such a matter there can be no more competent authority. He testified before a legislative committee in 1880, that the salaries of the New York Aldermen, which are the same as those of some of the United States District Judges, were not too large considering the political drafts which were made upon them. That is, a government is called upon to pay an extra salary to an official, in order to enable him to pay his assessed share thereof to his political party. Mr. Kelly's statement is as yet only partially applicable to the offices of the National Government. But the possibility of such a state of things certainly justifies Congress in legislating to prevent it.

The most serious indirect effect of the system is its influence upon the character and conduct of political parties. In the eyes of the party out of power the whole body of the officers and employés of the National Government constitute a mercenary force which draws money from the national treasury and spends it for the purpose of depriving them of the honors and emoluments of office, and of the opportunity of putting their principles of administration into operation. The result is to introduce into every political contest elements which are wholly foreign to it. The rancor of such contests is increased; the confidence of a large number of citizens in the honest and unpartisan administration of the laws regulating elections is greatly diminished, and the disposition to dispute the declared result of such

elections, either by resort to immediate violence or to legal contests, is consequently greatly increased. The point raised by the petitioner that this law endeavors to regulate the conduct of office holders merely in their private capacity, and that Congress can only regulate the purely official acts of an office holder, appears to us immaterial, because it rests in a misunderstanding of the law. But the argument drawn from it, that if this decision be sustained it will amount to a declaration that Congress may enact all sorts of ridiculous sumptuary laws, is frivolous.

The Government may regulate the official or the private acts of its employees whenever it finds that those acts directly affect the public welfare, and the administration of the public service. The validity of any such act rests primarily upon the fact of its necessity, of which Congress is the judge. It is submitted that a consideration of the various effects of the practice of levying and paying political assessments shows it, indisputably, to be a mighty and unmitigated public evil, and that Congress is, therefore, called upon, by every consideration of public policy and political science to do what it has thought best to attempt to legislate against it, and that such prohibitory legislation, if the means of prohibition be proper, is necessary and constitutional.

Second.—It remains only to consider whether the means employed by Congress are appropriate. Congress has certainly chosen a short and direct method of making the prohibition, by declaring the payment of assessments a misdemeanor, and imposing a fine for its commission. Assuming the necessity of some prohibition, the only objection to this statute is that it does not go far enough. This is, however, a common defect in new legislation, and will, no doubt, be remedied hereafter. If, however, the means chosen are not prohibited by the Constitution, and are not clearly repugnant to its spirit, their adoption is within the discretion of Congress. This being true, whether any particular means, as in this case, the imposition of the fine, is or is not the best means for effecting the purposes of the statute, is not to be determined by the judgment of this court. That is wholly within the discretion of Congress.

Alexander Hamilton, in his opinion on the constitutionality of the National Bank, said :

" The criterion of what is constitutional and what is not so is the end to which the measure relates as a means. If the end be clearly comprehended within any of the specified powers, and if the means have an obvious relation to that end, it may be deemed within the provisions of the national authority."

In Hepburn *vs.* Griswold, 8 Wall., 604, the Supreme Court said :

" Among means plainly adapted, *not inconsistent with the spirit of the Constitution*, nor prohibited by its terms, the Legislature has unrestricted choice."

And again, in McCullough *vs.* State of Maryland, 4 Wheat., 421, Marshall, *C. J.*, said that—

" If the end be legitimate and within the scope of the Constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect."

Again, in the same case :

" If a certain means to convey into effect any of the powers expressly given by the Constitution to the Government of the Union, be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance."

Indeed, the effect of the whole line of judicial decisions, from Fisher *vs.* Blight, 2 Cranch, 358, to the present time, is, that almost the only restrictions upon the powers of the Congress are in the express prohibitions of the Constitution. That it is within the discretion and judgment of the Congress to select the means best adapted to promote the ends authorized in the Constitution is beyond dispute. Its power to give to the United States priority in the payment of debts (Fisher *vs.* Blight, *supra*), to incorporate a National Bank (McCullough *vs.* Maryland, 4 Wheaton, 316), to control the militia of the States when called into actual serv-

ice by the President (Martin *vs.* Mott, 12 Wheat., 19), to provide for internal improvements (1 Kent, 267), to sell land for the non-payment of taxes (Springer *vs.* U. S., 102 U. S., 586), to exclude improper literature from the mails (Jackson's Case, 96 U. S., 727), rest upon this solid foundation. It was laid by Webster and Marshall, and without it the whole structure of our Government would have fallen long ago.

III.—This Law rests upon the same basis as the whole Criminal Legislation of Congress.

On the argument of the demurrer to the indictment of the petitioner, the constitutionality of the law was questioned on the ground that there was no clause in the Constitution which authorizes the passage of such a law, and that it was not within the general legislative power of Congress to pass it.

The complete answer to this proposition is that the law stands upon precisely the same footing as nearly the whole criminal legislation of the United States, legislation which is warranted—not by any express grant, but by necessary or reasonable implication. The Constitution gives Congress power "to provide for the punishment of counterfeiting the securities and current coin of the United States, and to define and punish piracies and felonies committed on the high seas and offences against the law of nations;" but it does not expressly give power to define or punish any other crimes whatsoever. In providing, Art. III., sec. 2, that "the trial of all crimes except in cases of impeachment shall be by jury," the existence of crimes other than those which Congress was given power to define, was undoubtedly contemplated; but no express power to make such definition was given. It was very early decided that the courts of the United States could exercise no common law jurisdiction in criminal cases. Such jurisdiction was held "not to be within their implied powers."

U. S. *vs.* Hudson *et al.*, 7 *Cranch Rep.*, 32.

So Chief Justice Marshall said: "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law until some statute shall change their established principles; but courts which are created by written law and whose jurisdiction is defined by written law cannot transcend that jurisdiction.

EX PARTE BOLLMAN, 4, *Cranch*, 93.

Congress has, therefore, from the necessities of the case, passed numerous laws declaring that many acts, which need not be enumerated here, shall be deemed crimes or misdemeanors, and it has also provided the penalties for such acts. Referring to such acts, the United States Circuit Court said *per* Chase, J., in *Worrall's Case*, 2 *Dall.*, 384:

"Besides the particular cases, which the 8th section of the first article of the Constitution designates, there is a power given to Congress to create, define and punish crimes and offences, *whenever they shall deem it necessary and proper by law to do so, for effectuating the objects of government;* and although bribery is not among the offences specifically mentioned, it is certainly included in this general provision."

And Peters, J., in the same case, went so far as to say:

"Whenever an offence aims at the subversion of any Federal institution, or of the corruption of its public affairs, it is an offence against the well being of the United States; from its very nature it is cognizable under their authority; and consequently it is within the jurisdiction of this court by virtue of the 11th section of the judicial act."

The statute which is here attacked stands together with all the laws of this class. There is no express power conferred upon Congress by the Constitution to enact any one of them. But it is certainly not disputed, that they are constitutional. They are based upon the general implied power in every political body to preserve its own existence, and to promote the end and object of its own creation. A power which, in the language used by the Supreme Court in a little different connection, is "co-eval probably with the

first formation of a limited government, belongs to the system of universal law, and may as well support the assumption of many other powers as those more familiarly acknowledged by the common law of England."

IV.—The Power to pass this Law is a corollary of the Power to create Offices.

Article II., sec. 2, paragraph 2 of the Constitution gives Congress the power of establishing inferior offices and of vesting their appointments as they think proper in the President, in the courts of law, or in the heads of departments. Congress may thus create offices, prescribe what the duties of the officers shall be, and regulate the manner of appointing them. If it may regulate what they shall do, it may equally regulate what they shall not do. Congress, or the heads of department may make regulations for the conduct of its employees of just as minute a character as is necessary to secure the proper administration of those offices, or as, in the judgment of Congress, the promotion of the general welfare requires.

The Legislature can abolish or change an office created by it, and extend or abridge the terms of its incumbents.

In re Bulger, 45 Cal., 553.
Collins *vs.* Tracey, 36 Tex., 546.

But if the appointing power may remove at discretion and without cause on the part of the employee removed, then surely Congress may legislate regarding the removal of employees when such removal, in the opinion of Congress, becomes necessary for the public good.

Congress may also regulate the tenure of all the officers which it creates. It has already passed an act on this subject—the Tenure of Office Act. That extends only to those officers who are appointed by the President by and with the advice and consent of the Senate. Their tenure is secured by the enactment that the consent of the Senate shall be required before their removal is effected. But the larger

class of employees hold office solely at the pleasure of their official superiors.

Their relations to these superiors in office are such that they cannot be independent, and when a request for money is made, it is made, or may be made, by those who may enforce compliance by the threat of removal, or punish noncompliance by actual removal.

It is, therefore, competent for Congress to protect public servants from such exactions. Can there be any doubt that Congress can fix the tenure of public officers? If it can do this, is it not equally clear that it can, indirectly, secure faithful officers in the tenure of their offices by prohibiting them from making payments for political purposes to any other officers of the Government, and thus enabling them to say, with security, in response to such a demand: "It is unlawful for me to pay."

So far, therefore, from limiting the independence of public servants, this beneficent legislation secures it. They are not prohibited from making really voluntary contributions. They are prohibited from making payments to those persons towards whom, in the nature of things, they do not and cannot exercise a feeling of entire independence.

In ignorance of the conditions which necessitate many regulations imposed by Congress or the appointing power, such regulations may sometimes appear to interfere with the private affairs of the individual in matters in no way affecting the Government. The regulations which have been found necessary for the conduct of employees in the mints are, at first blush, of such a character. Very likely if any one of the members of the Convention of 1787 could be brought back to earth, in ignorance of the course of evolution of the last sixty-five years, and in ignorance of the fact that all of the honors, emoluments and trusts of his government had become the spoils of the majority, and that political parties had come to consider and to treat the $50,000,000 paid to the national servants as a fund from which they might filch, or even plunder, for their maintenance, very likely, in such a case, the law here in controversy would seem to be an improper interference with the merely private conduct of individuals.

If any person with a full knowledge of the conditions is still of that opinion, he is under no obligation to subject himself to the the offensive regulation by accepting office. But if Congress, knowing those conditions deems it wise and necessary to impose such regulations upon the officers it creates, it is incontestably within its constitutional discretion to do so.

V.—The Power to pass this Law follows from the Power conferred upon Congress to Regulate Elections.

Art. 1. Sec. 4., of the Constitution authorizes the Congress to make or alter the regulations as to the manner of holding elections for Senators and Representatives, which should be prescribed by the Legislature of each State.

Under this section it has been held that the Congress is authorized to pass any act which, in its judgment, may be necessary to give expression to the popular will at the ballot box, free from force, fraud or venality, and to punish any acts which, in the judgment of the Congress, shall tend to interfere with the purity of elections.

Ex parte Siebold, 100 U. S. (10 Otto), 371.

Indictments under the statute against bribery have been sustained by the courts.

U. S. R. S., § 5511.
U. S. *vs.* Hendric, 2 Sawyer, 476.
U. S. *vs.* O'Neill, *Ibid.*, 481.
U. S. *vs.* Johnson, *Ibid.*, 482.

The framers of the Constitution and those who were most active in the early history of the republic foresaw that danger from venal elections was impending. They warned the people against it, and they warned the Congress against it in language that clearly shows they thought that body had power to provide by law all possible safeguards.

In 1789 John Adams wrote to Roger Sherman (Works of John Adams, vol. 6, p. 434):

"I am apprehensive that this defect in our Constitution (the negative of the Senate upon appointments by the Executive) will have an unhappy tendency to introduce corruption of the grossest kinds, both of ambition and avarice, into all our elections, and this will be the worst of poisons to our Constitution. It will not only *destroy* the present form of government but render it almost impossible to substitute in its place any free government."

In Adams' inaugural speech to both Houses of Congress (4 March, 1797, *Ibid.*, vol. 9, p. 108), he said plainly:

"We should be unfaithful to ourselves if we should ever lose sight of the danger to our liberties if anything partial or extraneous should infect the purity of our free, fair, virtuous and independent elections."

Was this idle declamation? Or was it a recommendation to the Congress in obedience to the injunction of article 2, section 3 of the Constitution, that they should consider this subject and adopt such measures in relation to it as should be "necessary and expedient."

And now that in a later generation the Congress has adopted this measure, which was considered necessary and expedient, will the court say that the powers which the second President of the United States and the chief defender of the Declaration of Independence, thus officially acknowledged, had in fact no existence?

The declarations of another President of the United States, who well knew the views of the framers of the Constitution, are equally explicit.

When the termination of his official term approached, and John Quincy Adams was asked to contribute money in aid of his own election, he replied (Quincy's Life of Adams, p. 170):

"The Presidency of the United States is not an office to be either sought or declined. To pay money for securing it is, in my opinion, incorrect in principle. The practices of all parties are tending to render elections altogether venal, and I am not disposed to countenance them."

The politician will say: Very naturally he was defeated. True. If it is lawful to use money to carry elections, and for that purpose to collect a fund from those who in Mr. Adams' words, are "*in the power of the Fresident*," in order to perpetuate that power, the man who refuses the money will always lose the place.

And can it be seriously argued that when brought face to face with this evil, the hands of the Congress are tied, that the Constitution which created it, gave it no antidote to this poison, no power to avert this threatened destruction. Such arguments used to be common at the beginning of the war. They were uniformily overruled. Every government must have power, from its very nature, to preserve its own existence. This is inherent in every living organism. It is only dead matter that cannot keep itself from decay. When the body can do this no more, from that moment it begins to die.

Fourth Point.

The Constitutionality of the Law is to be affirmed unless it is shown to be clearly in violation of the Provisions of the Constitution.

The petitioner must show affirmatively that the law is not constitutional. We do not think that the proposition asserted by the defense upon the trial, viz., that the Government must show that the law *was* constitutional, requires refutation and unless it is clearly shown that Congress has transgressed its authority, the law must be upheld.

The authorities upon this point are pertinent, full and conclusive.

Judge Cooley, says :

" Nor can a court declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of a citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected by the Constitution."

Cooley's Con. Limitations, p. 200.

" A decent respect for the co-ordinate branches of the Government demands that the judiciary should presume, until the contrary is clearly shown that there has been no transgression of power by Congress. * * * It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt."

Legal Tender Cases, 12 *Wall.*, 457.

" An act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for a reasonable doubt."

Commonwealth vs. *Smith*, 4 *Binn.*, 123.
Munn vs. *Illinois*, 94 *U. S.*, 113.

" It is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a strong conviction of their incompatibility with each other."

Fletcher vs. *Peck*, 6 *Cranch*, 87.

" Before proceeding to annul by judicial sentence what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumutious."

People vs. *Supervisors of Orange*, 17 *N. Y.*, 241.

" We came back to the proposition that no law can be pronounced invalid for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citi-

zens of the State, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision it is valid, and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the methods provided by the Constitution."

Berthol vs. *O'Reilly*, 74 *N. Y.*, 514.

CONCLUSION.

The meaning and object of the statute therefore being clear, as it is not prohibited by the constitution, nor repugnant to its spirit, as it is within the implied powers of Congress, as it is a necessary attendant upon the power to regulate elections and create offices, and, as it imposes a regulation necessary for the public welfare, its enactment is within the discretion of Congress. It is therefore constitutional and the writ should be dismissed, and the petitioner remanded to custody.

EVERETT P. WHEELER,
FREDERICK W. WHITRIDGE,
Of Counsel.